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In the Supreme Court of the United States

OCTOBER TERM, 1986

FORD MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

The State of Michigan promulgated an emission limitation as part of a State Implementation Plan (SIP) under the Clean Air Act. That limitation was approved by the Environmental Protection Agency, but a Michigan state court subsequently entered a final judgment holding that the limitation was fundamentally flawed from the outset, and therefore void *ab initio*, because it was promulgated in the mistaken belief that it was achievable through the use of "reasonably available control technology." Against this background, the question presented is:

Whether, consistent with the Clean Air Act and the Due Process Clause, the United States may maintain an enforcement action in federal court under the Clean Air Act for alleged noncompliance with an emission limitation invalidated by a court of the state that adopted the limitation, notwithstanding the fact that challenges to the technological and economic feasibility of a SIP are within the exclusive competence of the state judicial system.

RULE 28.1 STATEMENT

A listing of petitioner's subsidiaries (other than wholly owned subsidiaries) and affiliates is set forth at App. H, *infra*, 72a-74a.

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FORD MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ford Motor Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 814 F.2d 1099. The oral ruling of the district court (App. B, *infra*, 10a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*, 18a-19a) was entered on March 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Relevant provisions of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, are reprinted at App. G, *infra*, 63a-71a.

STATEMENT

The court of appeals has held that the Environmental Protection Agency may maintain an enforcement action in federal court under Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), for alleged violations of a provision of a State Implementation Plan (SIP), even though a court of the state that adopted the provision entered a final judgment holding the provision void *ab initio*. The principal issue presented by this case is whether a federal administrative agency is free simply to ignore the final judgment of a state court on a question committed to the exclusive competence of the state judicial system. Before turning to the facts of this case, we briefly describe the statutory framework applicable to this dispute.

1. *The Promulgation Of State Implementation Plans.* The Clean Air Act has been aptly described as "a bold experiment in cooperative federalism." *Connecticut* v. *EPA*, 696 F.2d 147, 151 (2d Cir. 1982). Under the federal-state partnership created by the Act, the Administrator of EPA promulgates National Ambient Air Quality Standards (NAAQSs) for a variety of pollutants. Section 109, 42 U.S.C. § 7409.[1] Although the NAAQSs are established by EPA, Congress vested each state with the "primary responsibility for assuring air quality within the entire geographic area comprising such State." Section 107(a), 42 U.S.C. § 7407(a). Thus, Section 110 of the 1970 Act, 42 U.S.C. § 7410, required each state to adopt and submit to the Administrator an implementation plan providing for the attainment, maintenance, and enforcement of the NAAQSs. If the Administrator determines that the plan meets the require-

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[1] The Act directed the Administrator to promulgate two levels of NAAQSs. National "primary" standards are air quality standards that, in the Administrator's judgment, are "requisite to protect the public health," and national "secondary" standards are those "requisite to protect the public welfare." Section 109(b)(1) and (2), 42 U.S.C. § 7409(b)(1) and (2).

ments of Section 110(a)(2)(A)-(K), 42 U.S.C. § 7410 (a)(2)(A)-(K), he is required to approve it. Once a state-promulgated SIP has been approved by EPA, it may be enforced by either the federal or state governments. 42 U.S.C. §§ 7410(a)(2)(D), 7413. If a state fails to adopt a SIP that meets the requirements of the Act, the Administrator is expressly authorized to promulgate his own implementation plan for that state. Section 110(c), 42 U.S.C. § 7410(c).

2. *State Administrative And Judicial Primacy Over Claims Of Technological And Economic Infeasibility.* Shortly after passage of the 1970 Act, the courts of appeals divided over the issue whether the Administrator could consider claims of economic or technological infeasibility in deciding whether to approve a state-promulgated SIP. This Court resolved the conflict in *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), holding that the Administrator may *not* take such concerns into account. The Court determined that Section 110(a)(2) of the Act, 42 U.S.C. § 7410(a)(2), limits the Administrator's role to ensuring that state plans comply with the *minimum* federal standards established by the Act; it does not permit him to second-guess a state's decision to impose more stringent requirements, even if those requirements are *so* stringent that it is not feasible to comply with them. 427 U.S. at 261-265.

Because the Administrator may not consider claims of technological or economic infeasibility, the Court further held that federal courts of appeals reviewing the Administrator's approval of a state plan under Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1), likewise may not consider such claims. *Union Electric Co.*, 427 U.S. at 266-267. Instead, the Court suggested that "[p]erhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan." *Id.* at 266. The Court also observed that

a party dissatisfied with the state agency's resolution of such issues "may be able to take its claims of economic or technological infeasibility to the state courts." *Id.* at 266-267.

3. *Revised SIPs Required For "Nonattainment" Areas And The "RACT" Standard.* The 1970 Act required SIPs to provide for the attainment of the primary NAAQSs by 1975. In many areas of the country, however, that statutory deadline was not met. See generally *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 847 (1984). In the 1977 amendments to the Act, those areas were designated as "nonattainment" areas. 42 U.S.C. §§ 7407(d), 7501(2). For such areas, the 1977 legislation generally extended the deadline for attainment of the primary NAAQSs to December 31, 1982, and required each state to submit by July 1, 1979, a revised SIP for EPA's approval. 42 U.S.C. § 7502(a)(1) and (b).

With respect to existing major stationary sources of air pollution not undergoing modification, the revised SIPs required by the 1977 amendments had to provide for such reductions in emissions "as may be obtained through the adoption, at a minimum, of reasonably available control technology." Section 172(b)(3), 42 U.S.C. § 7502(b)(3). The Clean Air Act nowhere defines "reasonably available control technology," which has come to be known by "the inevitable if unlovely acronym" of "RACT." *Bethlehem Steel Corp.* v. *EPA*, 782 F.2d 645, 650 (7th Cir. 1986). Even in the absence of a statutory definition, however, it is clear that economic and technological feasibility are the cornerstones of RACT. Thus, EPA has defined RACT as "[t]he lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available *considering technological and economic feasibility.*" 45 Fed. Reg. 59331 (1980) (emphasis added). See also 40 C.F.R. § 51.1(*o*).

The combined effect of the Court's decision in *Union Electric* and the minimum requirement of RACT for existing sources in nonattainment areas is that the Administrator may—indeed, must—consider technological and economic factors to the extent necessary to determine that a state's submission requires the use of RACT, but that he may not *disapprove* a state's submission based on a determination that it requires *more* than RACT, *i.e.*, that it is technologically and economically *infeasible*. That is because, as *Union Electric* clearly held, a decision to impose infeasible requirements is left to the sole discretion of the states. 427 U.S. at 265.[2] By the same token, a federal court reviewing the Administrator's decision to approve a SIP submitted under the 1977 amendments may not consider arguments that the requirements of a state plan are technologically and economically infeasible and, therefore, more stringent than RACT. See, *e.g.*, *National Great Lakes Steel Corp.* v. *Gorsuch*, 700 F.2d 314, 324 (6th Cir. 1983).

4. *The Consequences For Enforcement Actions Of State Primacy Over Claims Of Economic And Technological Infeasibility.* This Court's decision in *Union Electric* did not elaborate on its statement that state agencies and state courts are the appropriate forums in which to raise claims of economic and technological infeasibility. In particular, the Court left open the question whether such claims may also be raised as a defense to a federal enforcement action. *Union Electric*, 427 U.S. at 268 n.18. In the wake of *Union Electric*, however, the only two courts that have squarely considered the question have held that such claims may *not* be raised as a defense

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[2] The "one-way" consideration that the Administrator must give to RACT is not a significant change from his role under the 1970 Act. There, too, economic and technological factors were relevant in determining whether the Act's *minimum* requirements were met, but infeasibility was not a legitimate basis upon which to disapprove a state plan. See *Union Electric*, 427 U.S. at 264-265 & n.14.

to an enforcement action. *United States* v. *Wheeling-Pittsburgh Steel Corp.*, 642 F. Supp. 468, 473 (W.D. Pa. 1986); *Friends of the Earth* v. *Potomac Electric Power Co.*, 419 F. Supp. 528, 535 (D.D.C. 1976). See also Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 Harv. L. Rev. 316, 352-353 (1975). Moreover, EPA has consistently taken the position that claims of technological and economic infeasibility are not a defense to an enforcement action. Thus, as a practical matter, the state courts are the *only* judicial forum in which such claims may be raised.

The question presented in this case is yet another crucial issue left unresolved by *Union Electric*—what effect does a state court's judgment that an EPA-approved SIP is invalid have on EPA's ability to maintain a federal enforcement action? In other words, if a company accepts this Court's invitation in *Union Electric*, challenges a SIP in state court, and obtains a final state court judgment holding that the SIP was invalid *ab initio*, may EPA ignore that ruling and maintain an enforcement action in federal court seeking monetary penalties and other relief for "violations" of the same invalid SIP? Two courts of appeals have confronted this important question. In *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1148 (1983), the Seventh Circuit expressly held that "a successful state court challenge * * * render[s] an implementation plan provision unenforceable in both federal and state court." As described below (see pages 12-13, *infra*), the Sixth Circuit reached precisely the opposite result in this case.

5. *The Facts Of This Case.* Ford owns and operates a plant in Mount Clemens, Michigan, for the manufacture and coating of vinyl products. At the time this action was filed, the Mount Clemens plant produced approximately 85% of the requirements of Ford's North American automotive operations for vinyl-coated materials, in-

cluding automobile roofs, upholstery, and other interior components. C.A. App. 78.

a. *The Allegations In The Government's Complaint.* On September 26, 1984, the United States, on behalf of EPA, commenced this enforcement action against Ford under Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b). The government alleged that eight vinyl "coating lines" at the Mount Clemens plant were emitting volatile organic compounds (VOCs) in excess of the rate permitted by R. 336.1610 of the Michigan Administrative Code, Air Pollution Control Commission, General Rules (Rule 610). C.A. App. 11-16.[3] Because EPA had approved Rule 610 as part of Michigan's revised SIP in May 1980 (40 C.F.R. § 52.1172), the government contended that Rule 610 was federally enforceable. C.A. App. 8. The government sought injunctive relief against the continued operation of the eight vinyl coating lines at Ford's Mount Clemens plant and penalties of up to $25,000 per day of violation for each of the coating lines—*i.e.*, penalties of up to $200,000 per day. *Id.* at 10-17. EPA did not consult with the State of Michigan before filing suit. App., *infra*, 61a.

b. *Michigan's Review Of The Feasibility Of Compliance With Rule 610.* On March 5, 1979, the staff of the Air Quality Division of the Michigan Department of Natural Resources wrote to Ford acknowledging that

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[3] As promulgated by the Michigan Air Pollution Control Commission in January 1980, Rule 610 provided in pertinent part (C.A. App. 74):

> (3) It is unlawful for a person to cause or allow the emission of volatile organic compounds from the coating of * * * vinyl * * * from any existing coating line, in excess of the equivalent emission rates as shown in table 63.

Table 63, contained within Rule 610, provided that the allowable emission rate for the coating of vinyl (the vinyl "coating standard") was 4.5 pounds of VOCs "per gallon of coating (minus water) as applied." C.A. App. 77.

Rule 610, which was based on the limited data available in the late 1970s, might prove to be more stringent than RACT, even though that was the standard required by the Clean Air Act and the standard that the State intended to impose. App., *infra*, 34a. Thereafter, the State concluded that the emission *rate* limitation in Rule 610 could not reasonably be met by each of the eight vinyl coating lines, but that *total* emissions could be reduced to an equivalent level by other means. *Ibid.*

In light of the State's conclusions, Ford and the State negotiated a Consent Order in May 1983. This order set a new VOC limitation and established a schedule for installation of state-of-the-art control equipment on two of the eight coating lines at the Mount Clemens plant (Nos. 7 and 8). App. *infra*, 34a. The Consent Order further required a 250-ton reduction in total VOC emissions from the remaining six coating lines by December 31, 1985. *Ibid.*

Pursuant to that order, Ford spent $3 million to install state-of-the-art control equipment on coating lines 7 and 8. App., *infra*, 45a. In addition, Ford spent $3 million to achieve an additional 450-ton reduction in total VOC emissions, substantially exceeding the 250-ton reduction called for by the order. *Ibid.* The reduction was achieved by installation of an "embossed last" process that reduced the number of coatings applied. *Ibid.*

Even though Ford subsequently met or exceeded the goal for reducing *total* VOC emissions that formed the basis for the *rate* limitation in Rule 610, as well as the goal set in the Consent Order, it was apparent by late 1983 that Ford still would be unable to meet the emissions *rate* limitation of Rule 610 or of the 1983 Order on coating lines 7 and 8. App., *infra*, 34a-36a, 41a, 43a. In February 1984, therefore, Ford and the State began another extensive technical review of VOC emissions at the Mount Clemens plant. This review was ongoing when

the United States, without consulting the State of Michigan, sued to enforce the orginal rate limitation in Rule 610.

c. *Ford's State Court Action.* On October 16, 1984, Ford filed suit against the Michigan Air Pollution Control Commission, the Michigan Natural Resources Commission, and the Michigan Department of Natural Resources in the Circuit Court for the County of Ingham, Michigan. *Ford Motor Co.* v. *Michigan Air Pollution Control Comm'n*, No. 84-53025-CZ. Ford contended, *inter alia*, that Rule 610 was "contrary to the Michigan Air Pollution Act and void and unenforceable" because the "emission limits set forth in the Rule and allegedly applicable to Ford * * * are technically and economically infeasible." C.A. App. 80.

Following the filing of Ford's state court action, the staff of the Air Quality Division of the Department of Natural Resources intensified its technical review of Rule 610. The staff reported to the Air Quality Control Commission that, when originally established, the limit on VOCs in Rule 610 was believed to be economically and technologically feasible based on the data then available. App., *infra*, 34a. Upon reevaluation, however, the staff concluded that the rate-based limit could not and cannot be achieved through the application of RACT. *Id.* at 34a-35a. The fundamental flaw in Rule 610 was the underlying assumption that all VOCs used at the coating lines were emitted into the atmosphere and that RACT would capture 90% of the VOCs emitted from the coating lines and would remove 90% of the VOCs captured, leading to a reduction in the rate of VOC emissions of 81%. *Id.* at 43a. In fact, the "capture efficiency" for state-of-the-art control equipment is below 60%. *Id.* at 46a-48a. Rule 610 had failed to account for losses of VOCs inherent in the production process, including a substantial portion that leave the plant as part of vinyl products and cannot

be captured by *any* emission control equipment. *Id.* at 47a.

On January 15, 1985, the Air Pollution Control Commission held a public hearing to consider the staff's recommendation that it adopt an order setting new VOC emission limits and a schedule for compliance at the Mount Clemens plant. App., *infra*, 33a-37a, 55a-62a. At the hearing, the Commission heard statements from the staff and from Ford. In addition, a representative of the Michigan Attorney General's office testified that the Commission should adopt the staff recommendation if it concluded, based on the evidence presented, that the State had "made a mistake in the promulgation of" Rule 610 (*id.* at 60a). The State's counsel further stated that "all of the people that I would look to as witnesses to defend your rule are people who are here recommending to you that the rule be changed." *Ibid.* Thus, any defense of the rule in the Michigan state court action brought by Ford would have been a sham. After considering the staff report and the oral and written comments received (including comments filed by the United Automobile Workers of America in support of Ford's position), the Commission formally adopted the staff's recommended "Stipulation for Entry of Consent Order and Final Order" (*id.* at 61a-62a).

On March 18, 1985, after reviewing and considering the Order of the Air Pollution Control Commission, the Staff Report of the Department of Natural Resources, the comments on that report, and the transcript of the Commission's public hearing, the Circuit Court for Ingham County entered a Final Judgment on Ford's verified petition. App., *infra*, 22a-23a. The Final Judgment expressly affirmed the Commission's Order and adopted the following Findings of Fact made in the Order (*id.* at 22a, 27a-28a):

5. In adopting the Vinyl Limit [Rule 610], which was recommended by the Staff, the Commission believed that they were imposing a requirement which was technologically and economically feasible; that is, [a] requirement that was achievable through the use of reasonably available control technology.

6. Based on the Staff's review of technical and economic data for Coaters 7 and 8 and upon the Commission's hearing of testimony from the Staff and the Company, the Commission finds that for coaters 7 and 8, the Vinyl Limit was (and is) not achievable through the use of reasonably available control technology.

7. Based upon the Staff's review of all technical and economic data, and upon the hearing of testimony from the Staff and the Company, the Commission finds that the emission control program set forth and agreed to below does represent emission limits which are achievable through the use of reasonably available control technology.

Accordingly, the Circuit Court's judgment vacated the vinyl coating standard contained in Rule 610 *as of its effective date*, December 31, 1982, and ordered Ford to adhere to the emission control program set forth in the Air Pollution Control Commission's Order, which it found to constitute "reasonably available control technology." App., *infra*, 28a. That program set new VOC emission rate limits for the two controlled coating lines (Nos. 7 and 8), provided for the phased shut-down of the six uncontrolled coating lines, and set a plantwide cap on total VOC emissions of 440 tons (or roughly an 88% reduction from the 3700 tons emitted at the plant in 1977). *Id.* at 28a-30a, 51a-52a.[4]

In addition, the state court judgment endorsed that portion of the Commission's Order that required submis-

[4] In accordance with the Air Pollution Control Commission's Order and the Final Judgment of the Circuit Court, the last of the six uncontrolled coating lines ceased operating on November 30, 1985.

sion of the new compliance program to EPA for approval as a SIP revision. App., *infra*, 30a. Pursuant to that Order, on March 6, 1985—more than two years ago—Michigan requested EPA to approve the Commission's Order as a SIP revision. EPA has not taken any action on Michigan's submission, however, even though the submission demonstrates that an important part of the existing SIP was invalid because it was promulgated on the basis of a mutual mistake about economic and technological feasibility. EPA has simply sat on its hands, acting neither to approve the proposed revision nor to disapprove it and promulgate its own SIP provision instead. At the same time, EPA has persisted in its efforts to collect penalties of up to $200,000 per day for years of alleged noncompliance with the original invalid SIP.

6. *The Decisions Below.* Following entry of the Michigan Circuit Court's final judgment, Ford moved for judgment on the pleadings in this action. Ford argued that the state court's invalidation of Rule 610 as of its effective date meant that there was no enforceable SIP provision upon which to premise EPA's enforcement action. The district court agreed and ordered the dismissal of the government's action. App., *infra*, 14a-15a.

The court of appeals reversed. App., *infra*, 1a-9a. In essence, the court of appeals decided an issue that was not before it, holding that SIP *revisions* may not take effect until they are approved by EPA. *Id.* at 4a, 6a-7a. Rather than focusing on the effect of a state court judgment holding a SIP void *ab initio*, the court apparently reasoned that the state court's judgment invalidating Rule 610 represented an advisory opinion that, while perhaps relevant to the amount of penalties to be imposed, was otherwise entirely ineffective until EPA chose —at whatever time in the future—to approve or disapprove it as a SIP revision. Thus, the Sixth Circuit concluded that Rule 610 remained federally enforceable unless and until EPA approved the proposed SIP revision submitted by the State. App., *infra*, 4a, 7a-9a.

The court of appeals distinguished *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (1983), in which the Seventh Circuit had held unenforceable a SIP provision determined by a state court to be void *ab initio*. The Sixth Circuit reasoned that the rationale of *Indiana-Kentucky* applied only to SIP's invalidated for "procedural" reasons. App., *infra*, 5a-6a. Here, by contrast, the state court's invalidation of Rule 610 rested on what the court of appeals termed "technical" grounds, *i.e.*, a determination of technological and economic infeasibility. App., *infra*, 6a. The Sixth Circuit did not explain why a state court can be deemed to have power to invalidate a SIP on procedural grounds but not to have power to invalidate it on grounds of technological or economic infeasibility—even though it is precisely the latter issue that is within the *exclusive* jurisdiction of the state courts under this Court's decision in *Union Electric*.

On Ford's motion, the court of appeals stayed the issuance of its mandate pending the timely filing and disposition of this petition.

REASONS FOR GRANTING THE PETITION

The decision below is in direct conflict with the decision of the Seventh Circuit and cannot be reconciled with an analogous decision of the Tenth Circuit. In addition, the Sixth Circuit's decision presents an important and sensitive question concerning the proper roles of EPA and the state courts in connection with the administration and enforcement of state air quality plans—a question that has not been decided by this Court, that has now divided the courts of appeals, and that is an inevitable consequence of this Court's decision in *Union Electric* that economic and technological infeasibility is not a proper issue either for EPA *or* the federal courts. Moreover, the decision below is wholly incompatible with the federal-state partnership created by the Clean Air Act, displays a remarkable disregard for the final judgment of a state

court in an area committed to the exclusive competence of the state judicial system, and raises substantial concerns under the Due Process Clause.

The Sixth Circuit ignored the role that Congress intended for the states in the administration of the Clean Air Act under the guise of advancing federal interests that Congress has already accommodated within the structure of the Act itself. Thus, the court of appeals wrongly concerned itself with a supposed threat to EPA's enforcement powers if state courts were permitted to render an EPA-approved SIP unenforceable. In fact, however, Congress expressly provided EPA with the authority to promulgate its own regulations in the event that a state fails to fulfill its role under the Act. Nothing in the Act suggests that the remedy Congress intended for a state-level failure to comply was a nullification of the final judgment of a state court.

The Sixth Circuit's decision is, in addition, so fundamentally unfair and draconian that it cannot have been within the contemplation of Congress. Here, for example, the federal government seeks to impose penalties of up to $200,000 per day against a company that has acted in the utmost good faith by pursuing the state court remedies to which it was remitted by this Court in *Union Electric*. According to the court of appeals, however, that state court proceeding—which represented Ford's only opportunity to be heard on its claims of technological and economic infeasibility—was simply an advisory opinion that EPA was free to ignore. Needless to say, providing an *opportunity* to be heard does not satisfy due process if the *outcome* of an exercise of that opportunity can be treated as a legal nullity.

The problem presented by this case has arisen on several occasions in the past, and it will continue to arise whenever states propose SIP revisions that subsequently turn out to have been invalidly promulgated. In light of

the conflict in the circuits, review by this Court is plainly warranted in order to ensure the continued smooth functioning of the federal-state partnership intended by Congress in the Clean Air Act.

A. The Federal Government May Not Maintain An Enforcement Action Under The Clean Air Act Based On Provisions Of A State Implementation Plan That A State Court Has Determined To Be Invalid As Of Their Inception.

As this Court's decisions in *Union Electric* and *Train* v. *NRDC*, 421 U.S. 60 (1975), make clear, the Clean Air Act is a federal-state partnership. Under that partnership, EPA is responsible for determining the national standards that must be attained under the Act, but the individual states have the responsibility and authority for determining the precise mix of control strategies best suited to their own needs and the "*primary* responsibility for assuring air quality within the entire geographic area comprising such State." 42 U.S.C. § 7407(a) (emphasis added). As the Court stated in *Train* v. *NRDC*, 421 U.S. at 79 (emphasis added):

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, *it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations* which are necessary if the national standards it has set are to be met.

In order to give meaning to Congress's policy of state primacy, the federal courts have consistently held that challenges to a state SIP must be brought in the state courts. In *Union Electric*, for example, this Court first held that a federal court may not review claims that a SIP is technologically or economically infeasible because the Administrator himself may not consider such claims in deciding whether to approve a SIP. The Court added, however, that the unavailability of review in federal

court did not mean that these claims could never be litigated: a party dissatisfied with a state agency's SIP may "take its claims of economic or technological infeasibility to the state courts." 427 U.S. at 266-267. See also *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 814 & n.14 (9th Cir. 1980); *Ohio Environmental Council* v. *EPA*, 593 F.2d 24, 29 (6th Cir. 1979); *Appalachian Power Co.* v. *EPA*, 579 F.2d 846, 854-855 (4th Cir. 1978); *Indiana & Michigan Electric Co.* v. *EPA*, 509 F.2d 839, 847 (7th Cir. 1975).

Ford did just that in this case. It sued in state court and obtained a final judgment holding that Rule 610 was invalid as of its effective date. But the court of appeals —in a remarkable about-face from the prior teachings of the federal courts—held that EPA need give no effect to that state court judgment. Ford thus finds itself in the middle of a game of ping-pong in which, after properly resorting to state court, it is bounced back to federal court to face a federal enforcement action bottomed on the continued viability of a rule that the state court has held invalid from its inception. Contrary to the court of appeals' assumption, neither the Clean Air Act nor any "settled case law" (App., *infra*, 3a) compels such a Kafkaesque result.

The only other court of appeals to have considered the precise question presented here reached exactly the opposite result. In a situation that cannot be meaningfully distinguished from this case, the Seventh Circuit ruled that a state court judgment invalidating a SIP as of its inception constituted a complete bar to a federal action to enforce that SIP. *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (1983). The Seventh Circuit reasoned that its holding was compelled by the many federal court decisions directing litigants to take their challenges to state-promulgated SIPs to state court (716 F.2d at 1151 (footnote omitted)):

> If the state court procedural review afforded under the Act is to have meaning, the rulings of the state court must be given effect.
>
> * * * * *
>
> If we were to find that implementation plan provisions were enforceable despite state court invalidation of them, the state court review would be meaningless. Those who followed our pronouncements concerning the availability of state court review would find that their efforts had been for naught; and the Clean Air Act would be construed to reach the inconsistent result that an implementation plan, the product of a joint federal and state effort under the same Act, would be enforceable in the courts of one level of government but not the other.

The Sixth Circuit sought to distinguish *Indiana-Kentucky* on the theory that the Seventh Circuit's holding applied only to SIPs invalidated on state *procedural* grounds. App., *infra*, 6a. Nothing in the Seventh Circuit's analysis, however, indicates that it would reach a different result with respect to a fundamental *substantive* defect under state law. The controlling factor in both this case and *Indiana-Kentucky* was that the SIPs suffered from such fundamental flaws in the promulgation process that they were invalid from their inception. Furthermore, it was a critical feature of both cases that the issue of validity involved a question—procedural compliance with state law in one case, economic and technological infeasibility in the other—that was within the exclusive jurisdiction of the state courts to pass upon. That the flaw in one case was procedural and in the other substantive cannot possibly justify a different result when, at the end of the day, both plans were declared by their respective state courts to have been nullities from the outset.

The total illogic of the "procedural/substantive" dichotomy relied upon by the Sixth Circuit is further dem-

onstrated by the Seventh Circuit's express endorsement of the decision in *Illinois* v. *Celotex Corp.*, 516 F. Supp. 716 (C.D. Ill. 1981). There, both Illinois and EPA sought to enforce in federal court a SIP provision that had been invalidated in state court on the "procedural" ground that the state had failed to give adequate consideration to the "technological feasibility and economic reasonableness of the regulations." 516 F. Supp. at 717-718. The district court dismissed both the state and federal enforcement actions, holding that it "would be an anomaly, if not a denial of defendant's due process rights, to allow, at this point, full enforcement of those invalid regulations" (*id.* at 718). It would be equally anomalous to hold that the "procedural" failure adequately to consider technological and economic feasibility is a sufficient basis upon which to hold a SIP unenforceable, but the "substantive" failure to adopt a technologically and economically achievable regulation is not.

Indeed, if any distinction were to be drawn between "procedural" and "substantive" defects, it would be quite the opposite of the one embraced by the court below. It makes no sense to suggest that a state SIP invalidated in state court for purely procedural defects—defects that are presumably capable of correction—is unenforceable, while a state SIP invalidated in state court because it is so fundamentally flawed in its substantive aspects that no source is capable of complying with it may nevertheless form the basis for a federal enforcement action—an action in which, further, the very issue of infeasibility may not even be raised in defense.

The court of appeals advanced other grounds on which to distinguish the Seventh Circuit's decision in *Indiana-Kentucky*, but they are no more persuasive than the procedural/substantive dichotomy addressed above. First, the Sixth Circuit insisted that Rule 610, unlike the in-

validated Indiana SIP considered by the Seventh Circuit, could not be deemed void *from its inception.* Thus, the court devoted a substantial portion of its opinion (App., *infra*, 4a-7a) to the proposition that SIP *revisions* may not take effect until they are approved by EPA and that the provisions of an existing SIP remain effective and enforceable pending such approval. See *Train* v. *NRDC*, 421 U.S. at 92. In essence, the court of appeals treated the state court's judgment as nothing more than a step—and a purely advisory one at that—along the way toward processing a SIP revision. See App., *infra*, 8a.

If that were all this case involved, Ford would agree that the government could maintain the present enforcement action on the authority of this Court's decision in *Train* v. *NRDC*. But the Sixth Circuit fundamentally misunderstood the effect of the state court's judgment that Rule 610 is not—and never was—RACT. The essential holding of the state court is that Rule 610, although intended to reflect RACT, in fact is not and never has been technologically and economically feasible. App., *infra*, 27a-28a.[5] In other words, as the record before the state court showed, the parties labored from the very outset under a mistake of fact that caused the State of Michigan to submit, and EPA to approve, a SIP provision that could not be achieved through RACT when it was adopted and cannot be achieved through RACT now. Simply stated, therefore, Rule 610 was void as of its effective date, as the state court's judgment expressly held. A SIP provision promulgated in the mis-

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[5] The state court also endorsed the Air Pollution Control Commission's Order calling for the submission of a SIP revision to EPA. But the court of appeals clearly erred in treating the state court judgment as if that had been the *only* matter determined. On the contrary, the judgment of invalidity stands wholly apart from the proposed revision, and that judgment would be sufficient to bar this federal enforcement action whether or not the state court had also endorsed the proposed revision.

taken assumption that it represented RACT means that there never was a federally-enforceable SIP provision applicable to Ford's Mount Clemens plant. See *Indiana-Kentucky*, 716 F.2d at 1152.

The court of appeals also seemed concerned that states might "trump" EPA's enforcement powers by contriving to have their state courts invalidate SIP provisions so as to make their states more attractive places for industry to locate. App., *infra*, 5a. This speculation, which is premised on the unacceptable notion that state courts and administrative agencies will act in bad faith, has no support whatever in the record of this case.[6] What is more, the court of appeals failed to appreciate that the Clean Air Act gives EPA all the tools it needs to deal with any such possibility. As the Seventh Circuit explained in *Indiana-Kentucky*, Congress understood that states might fail in their obligation to promulgate valid

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[6] As previously noted (see page 10, *supra*), the Michigan Attorney General's office advised the Air Pollution Control Commission that it had no defense to the state court action initiated by Ford. Thus, not only is there no hint in this record of any collusion between Michigan and Ford, there also is no basis for viewing the consent judgment entered by the state court as any less authoritative than a final judgment entered after protracted litigation.

The court of appeals also observed that EPA was not a party to Ford's state court action nor was it formally notified of that action. See App., *infra*, 3a. In addition to the fact that the United States similarly failed to notify the State of Michigan before it instituted this enforcement action against Ford (see *id.* at 61a), any attempt to make the government a party to the state court action would have been a futile gesture. EPA of course would have been immune from any such suit (see, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980)), and the government almost certainly would have followed the long-standing Department of Justice policy of removing the action to federal court for the purpose of obtaining a dismissal. See U.S. Attorneys' Manual 4-5.700 at 24 (3/84). Moreover, EPA has insisted throughout this action that its own policy is *not* to participate in state proceedings involving SIPs but instead to take a "wait-and-see" attitude. See Affidavit of William L. McDowell, ¶ 4 (C.A. App. 84).

SIPs, and it therefore provided a federal remedy in the Act itself (716 F.2d at 1153-1154):

> The remedy Congress built into the Act in the event of a state level failure is for the EPA to demand an immediate state replacement or to promulgate its own implementation plan (or appropriate provision) for the state. This is the remedy Congress foresaw for state inaction or ineffectiveness.
>
> * * * * *
>
> Where, as here, Congress has clearly shown an intent to have state participation and an intent to have EPA formulate a plan in the event of state level failures, this court is not free to fashion unprecedented and unusual alternative remedies that have no foundation in the terms of the Act or in the Act's legislative history.

It is important to note that the Seventh Circuit's approach works *no* interference with EPA's ability to ensure that the goals of the Clean Air Act are met prospectively. In this case, for example, it was particularly unjustifiable for the Sixth Circuit to disregard the statutory remedy, when EPA has had it within its power for more than two years either to approve Michigan's proposed SIP revision or, if it deems that proposal not to comply with the Act, to propose and promulgate its own SIP provision. In view of this failure to act, it is simply outrageous for EPA to continue to assert the authority to penalize Ford with potential liabilities of $200,000 per day for not complying with the very provision that, more than two years ago, was invalidated by the state court with exclusive jurisdiction to resolve Ford's claim of infeasibility. EPA's failure to act clearly demonstrates that it is concerned only with collecting monetary penalties rather than advancing the policies of the statute.[7]

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[7] This conclusion is not at all surprising, however, in light of Ford's reduction in total VOC emissions from its Mount Clemens plant during the period of EPA inaction to a level well *below* that sought to be achieved under Rule 610. See pages 8, 11 n.4, *supra*; App., *infra*, 41a, 43a, 45a.

Not only did the court of appeals ignore the statutory remedy for a state's failure to comply with the Clean Air Act, but it also mistakenly assumed that states have an incentive to promulgate SIPs that fall short of the minimum requirements imposed by the Act. Under the 1977 amendments, however, precisely the opposite is true. If a state fails to submit an adequate SIP for its "nonattainment" areas (including the area in which Ford's Mount Clemens plant is located), it is subject to severe restraints on future growth (42 U.S.C. § 7410(a)(2)(I)) and to sanctions such as a cut-off of federal funds for transportation projects (42 U.S.C. § 7506(a)). See, *e.g.*, *Michigan* v. *Thomas*, 805 F.2d 176, 179 (6th Cir. 1986); *New Mexico Environmental Improvement Division* v. *Thomas*, 789 F.2d 825, 830 (10th Cir. 1986). Thus, a state has every incentive to submit an adequate plan and no reason at all to propose provisions that fail to comply with the Act.

The Tenth Circuit's decision in *New Mexico Environmental Improvement Division* is also material because it follows the Seventh Circuit's lead by holding that a SIP declared invalid from its inception by a state court is simply a nullity. The issue in that case was whether EPA properly imposed sanctions on New Mexico for failure to submit a SIP after New Mexico's previously-approved SIP was invalidated by the New Mexico Supreme Court. Ironically, it was EPA that argued in that case that the original SIP was a nullity. In affirming the agency's position, the Tenth Circuit cited *Indiana-Kentucky* with approval and stated (789 F.2d at 833 (emphasis added)):

> It is true that New Mexico did submit a plan which had been approved by the EPA prior to its invalidation by the New Mexico Supreme Court. However, mere submission of a plan is not enough. The plan submitted must also consider (i.e., satisfy) all requirements of section 7502. The [inspection and

> maintenance] program contained its infirmity from its inception. *Thus, EPA reasonably concluded that a satisfactory SIP in terms of section 7502 requirements had never been submitted. When the approved SIP contains an element that is invalidated by virtue of state law, adoption by the EPA is also invalidated. The status is as if the state had not submitted a SIP.*

EPA cannot have it both ways. EPA was correct in *New Mexico Environmental Improvement Division*, and it should not be heard to argue that the same result is not required here.

B. The Sixth Circuit's Decision Violates Well-Settled Principles Of Federalism And Comity.

The Sixth Circuit's willingness to allow EPA to ignore the final judgment of the Michigan state court is quite extraordinary. Although we are not aware of any precisely comparable situation, it is clear by way of analogy that the court's decision violates deeply rooted principles of federalism and comity.

This Court has recognized that "in a Union where both the States and the Federal Government are sovereign entities, there are basic concerns of federalism which counsel against interference by federal courts, through injunctions or otherwise, with legitimate state functions, particularly with the operation of state courts." *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977). Accord *Pennzoil Co.* v. *Texaco, Inc.*, 107 S. Ct. 1519, 1525-1527 (1987); *Juidice* v. *Vail*, 430 U.S. 327, 334 (1977); *Younger* v. *Harris*, 401 U.S. 37, 44-45 (1971). In fact, both the Anti-Injunction Act, 28 U.S.C. § 2283, and the *Younger* abstention doctrine arose from a basic respect for the competence of state courts. See *Younger*, 401 U.S. at 43. Here, although there has been no interference with *pending* state court proceedings, the Sixth Circuit's disregard for the *final* judgment of a state court is no less serious an interference with state sovereignty. Thus, the court of appeals not only has acted

in derogation of "basic tenets of comity and federalism," *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 478 (1982), but it has stripped the state court judgment of any legal force, thereby rendering the state court proceeding a nullity. In passing the Clean Air Act, Congress could not have intended to permit EPA and the federal courts to proceed in that fashion. See *Indiana-Kentucky*, 716 F.2d at 1153-1154.

C. The Sixth Circuit's Decision Produces Gross Inequities That Cannot Have Been Intended By Congress.

Congress also could not have contemplated the harsh consequences resulting from the court of appeals' construction of the Clean Air Act. The unfairness of requiring a party to defend itself against an enforcement action premised on an invalidated regulation would be apparent in any case, but it is particularly egregious in the circumstances presented here.

Union Electric teaches that the one issue that can never be litigated in federal court is the economic and technological feasibility of a SIP.[8] As previously explained, however (see page 4, *supra*), economic and technological feasibility is the essence of RACT. Thus, the court of appeals has held that a company's successful challenge to a SIP, based on its failure to represent RACT, in the only judicial forum available—a state court—may be disregarded in a federal enforcement action and that the company may be forced to defend itself against enormous monetary penalties for "violations" of a standard that, from its inception, never rep-

[8] Insofar as this issue is concerned, the court of appeals was simply wrong when it stated that "invalidation of an EPA-approved SIP may only occur in the federal appellate courts on direct appeal from the Administrator's decision under § 7607(b)(1)" (App., *infra*, 6a). On the contrary, economic and technological infeasibility is the one issue that can *never* form the basis for invalidation of an EPA-approved SIP in the federal appellate courts. See *Union Electric*, 427 U.S. at 266-267.

resented RACT. The Sixth Circuit's only response to this Catch-22 situation is to tell the company that it should seek a SIP revision and, in the meantime, offer its technological and economic arguments as "mitigating" circumstances for a district court's discretionary consideration in the setting of penalties. App., *infra*, 8a-9a.

We find it difficult to understand why anyone should be punished for failure to comply with an invalid regulation in the first place, but, in any event, the court of appeals' suggested answer to this dilemma is wholly inadequate. The law in the Sixth Circuit is that there is *no* time limit within which EPA must approve a proposed SIP revision. *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1182 n.1 (6th Cir. 1985). Thus, EPA may sit on a proposed SIP revision indefinitely, as it has done here, while at the same time taking advantage of the ruling in this case that the invalidated SIP remains enforceable and subjects "violators" to penalties of up to $25,000 per day—for as long as it may take EPA to act on the proposed revision. As a result, the decision below, coupled with the decision in *National Steel Corp.*, opens the door to substantial abuse.

Furthermore, as the Fifth Circuit recognized in *American Cyanamid Co.* v. *EPA*, 810 F.2d 493, 500 (1987), judicial refusal to allow EPA to profit by its own delay is necessary not simply in fairness to regulated companies, but also out of deference to EPA's partners in the Clean Air Act's scheme of cooperative federalism—the states:

> The emphasis of the statute * * * is upon the important role which the state plays in defining authorized emissions. * * * The issue then is not so much pollution by American Cyanamid but the default of the EPA in carrying out the congressional intent to work in close cooperation with the states in implementing standards and enforcing the Clean Air Act. We emphasize the importance of EPA acting, not for

> the benefit of American Cyanamid, but for the benefit of the State of Louisiana which is by statute designated to play a significant cooperating role with the EPA.

Here, too, the State of Michigan is entitled to greater cooperation from EPA than it has received during the more than two years that its proposed SIP revision has been pending.

D. The Sixth Circuit's Decision, By Refusing To Give Any Meaningful Effect To The State Court's Judgment, Denies Ford Its Right To Due Process.

As the Seventh Circuit recognized in *Indiana-Kentucky*, 716 F.2d at 1151, a ruling denying any meaningful effect to the judgment of a state court invalidating a SIP raises serious constitutional problems. This Court has held that " 'due process requires, at a minimum, that * * * persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.' " *Little* v. *Streater*, 452 U.S. 1, 5-6 (1981), quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971). Moreover, the Court has repeatedly held that this opportunity to be heard must be granted " 'at a meaningful time and in a meaningful manner.' " *Brock* v. *Roadway Express, Inc.*, 55 U.S.L.W. 4530, 4532 (Apr. 22, 1987), quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), in turn quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

In view of the overriding importance of the *meaningfulness* of the opportunity to be heard, it would make a mockery of this fundamental right to allow the Sixth Circuit's decision to stand. Although Ford has exercised its *opportunity* to be heard by litigating the validity of Michigan's SIP in state court, the outcome of that hearing has been rendered meaningless because the judgment of the state court has been given no force and effect in federal court, where no hearing on the relevant issues is

possible. Surely this result does not comport with Ford's due process right to a meaningful opportunity to be heard. That right necessarily supposes that the *outcome* of the hearing will be respected—not that it will be relegated to a mere plea for "mitigat[ion]" of penalties imposed for "violations" of an invalid regulation. See App., *infra*, 9a.[9]

It is no answer to the procedural run-around created by the court of appeals to assert that "the Clean Air Act envisions situations where standards currently economically or technologically infeasible will nonetheless be enforced." App., *infra*, 8a. Whatever the validity of that statement in other circumstances, it is demonstrably *not* true in the case of sources subject to a RACT standard, the essence of which is feasibility. See page 4, *supra*. Although Michigan of course could have adopted a standard more stringent than RACT (see *Union Electric*, 427 U.S. at 263-265), that was not the State's intent in this case (see App., *infra*, 27a, 34a). Contrary to the Sixth Circuit's assumption, therefore (*id.* at 8a), this is not a situation in which Congress intended to "close down" existing plants.[10]

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[9] The constitutional necessity for according decisive effect to the state court's judgment is demonstrated by this Court's recent decision in *United States* v. *Mendoza-Lopez*, No. 86-2067 (May 26, 1987). There, the Court held that an alien charged with violating 8 U.S.C. § 1326 (illegal entry following deportation) must be permitted to collaterally attack the validity of the underlying deportation order if the deportation proceedings were fundamentally unfair. See slip op. 9-10. Quite clearly, the Court's decision would make no sense unless it intended that the outcome of judicial review of the deportation order would be respected. The situation here is not distinguishable in any meaningful sense. Thus, although Ford has had the benefit of judicial review of Rule 610 in state court, the Sixth Circuit's refusal to require EPA to abide by the state court's judgment of invalidity just as surely deprives Ford of fundamental fairness as does a prosecution under 8 U.S.C. § 1326 that is bottomed on a deportation order entered in the absence of fair procedures.

[10] Significantly, the 1977 amendments require far more stringent standards of pollution control than RACT in the case of proposed

In any event, even if the Sixth Circuit's cavalier assertion were applicable to this case, the decision below does not comport with the constraints imposed by the Due Process Clause on "governmental decisions which deprive individuals of 'liberty' or 'property' interests." *Mathews*, 424 U.S. at 332. Enforcement of Rule 610 against Ford could subject the company to penalties of up to $25,000 per day for each coating line. Moreover, because compliance with Rule 610 is technologically and economically infeasible, the government's successful enforcement of that rule would force Ford to close its vinyl operations at the Mount Clemens plant. In sum, Ford would be deprived of substantial property rights after being afforded only a *meaningless* opportunity to be heard. This Court therefore should review the judgment below to ensure a constitutional and workable interpretation of the Clean Air Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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new major stationary sources of pollution or proposed modifications to existing major sources. See generally, *Chevron*, 467 U.S. at 850.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-1945

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

FORD MOTOR COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan

Decided and Filed March 27, 1987

Before: ENGEL and JONES, Circuit Judges; and EDWARDS, Senior Circuit Judge.

EDWARDS, Senior Circuit Judge. In this case Ford Motor Company and the United States are litigating a question fundamental to the authority of the federal government to control the emission of air pollutants within the boundaries of a particular state.

The pollutants at issue are volatile organic compounds which are the principal contributors to ambient ozone. The site of this dispute is a Ford Motor Company plant

located in Mount Clemens, Michigan. This factory coats vinyl products with solvent-based coating and emits ambient ozone from eight production lines.

Plaintiff cites a vivid description of the problems posed by ozone from the District of Columbia Circuit Court of Appeals:

> Ozone is the primary cause of the ill effects associated with smog, of which it usually comprises 65-100%. At certain concentration levels, ozone irritates the respiratory system and causes coughing, wheezing, chest tightness, and headaches. Due to its irritating nature, ozone can aggravate asthma, bronchitis, and emphysema. Some studies indicate that chronic exposure to fairly low levels of ozone may reduce resistance to infection and alter blood chemistry or chromosome structure. Ozone can destroy vegetation, reduce crop yield, and damage exposed materials by causing cracking, fading, and weathering.

American Petroleum Institute v. Costle, 665 F.2d 1176, 1177 (1981), *cert. denied*, 455 U.S. 1034 (1982).

The origin of this dispute is dated a decade ago. In February 1979 the United States Environmental Protection Agency (EPA) promulgated a combined primary and secondary national ambient air quality standard for ozone. This action was based on federal law, § 109 of the Clean Air Act, 42 U.S.C. § 7409. Michigan promulgated a State Implementation Plan which governed pollutants contributing to ozone formation in 1979, and U.S. EPA approved the State Implementation Plan in 1980. Two separate legal proceedings followed. On September 26, 1984, the United States initiated the first action under § 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), to enforce the EPA-approved State Implementation Plan (SIP). A month later, the Ford Motor Company filed suit in a Michigan state court against the Michigan Air Pollution Commission, the Michigan Natural Resources

Commission, and the Michigan Department of Natural Resources. Ford sought to enjoin the state defendants from enforcing the State Implementation Plan concerning which the United States had filed the first action. EPA was not a party to the state action nor was it notified of its pendency.

Ford and the state defendants named above then negotiated a consent judgment which was entered March 18, 1985. Ford then filed a motion for summary judgment in the federal proceeding contending that the EPA-approved SIP could not be enforced because the state court consent judgment had invalidated it. On August 5, the United States District Court orally granted the Ford Motor Company's motion and dismissed the federal government's action. After the United States' motion for reconsideration and modification of the District Court's judgment had been denied, the United States initiated this appeal.

Ford's contention in this litigation is that the state court consent judgment is controlling and that the United States has no authority to overrule it. Essentially the United States District Court accepted this point of view.

As we see the question posed by this case, it is as follows: whether a state court consent order which was entered in an action brought by the defendant (Ford) against state air pollution regulatory authorities but not the United States or any of its agencies, and which purportedly vacated a State Implementation Plan adopted under the Clean Air Act and approved by EPA, precludes federal enforcement of the previously federally-approved plan?

We believe that under the United States Clean Air Act and settled case law, the answer to this question must be "no."

Although it is clear that the Clean Air Act contemplates very significant participation in air pollution con-

trol by state air pollution control agencies, it is equally clear that the final authority is vested in the United States Environmental Protection Agency and the courts of the United States. In *Train v. NRDC*, 421 U.S. 60, 64 (1975), the United States Supreme Court pointed out that the 1970 amendments to the Act had "sharply increased federal authority and responsibility in the continuing effort to combat air pollution." Justice Rhenquist, now Chief Justice, writing for a nearly unanimous Supreme Court held:

> [A] polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the Environmental Protection Agency. Should either entity determine that granting the variance would prevent attainment or maintenance of national air standards, the polluter is presumably within his rights in seeking judicial review. This litigation, however, is carried out on the polluter's time, not the public's, for during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures.

Train v. NRDC, 421 U.S. at 92 (footnote omitted).

The Supreme Court's conclusion in *Train* is based upon the language of the Clean Air Act, which requires revisions of State Implementation Plans to be approved by EPA before such revisions are effective. *See* 42 U.S.C. § 7410(a)(3)(A) & (i).

The ultimate authority of the United States EPA is indeed recognized by the state Staff Report on which the commission's final order and state court judgment were based. In the Supplemental Amended Answer, Exhibit 3, that report stated:

> If approved by the Commission the Order will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP).
>
> * * * *
>
> Because the proposed Order reflects limits that are different than those in the currently approved Michigan SIP, the order must be submitted to EPA as a revision to the SIP. Such "site-specific" SIP revisions for existing sources must meet certain criteria in order to be approvable.

We observe at this point that standards for purification of the ambient air simply cannot be set along the boundaries of our 50 states. The winds, of course, recognize no such boundaries. The 50 states of this union compete intensely with one another for industry. As Congress has recognized, if state control of ambient air emissions were final, in short order, major shifts of smoke stack industries to states with the most lenient pure air standards would inevitably take place. Absent final authority in United States EPA, the attainment goals of the Clean Air Act would prove ephemeral.

In the face of overwhelming authority declaring that revisions of State Implementation Plans are ineffective until approved by EPA, Ford relies principally on a Seventh Circuit decision, *Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983). *Sierra Club* was a citizen suit seeking to enforce an EPA-approved SIP provision in federal court. Prior to the federal lawsuit, a state appellate court had held the provision invalid on state procedural grounds, namely that the state officer who presided over the hearing on the provision had failed to submit written findings to the Indiana Environmental Management Board, as required by state law. This failure to make written findings made it impossible for the Board to evaluate and review the decision. The Seventh Circuit held that federal enforce-

ment was barred because the SIP provision was not adopted in accordance with applicable state procedures, and therefore, was an invalid plan submission to EPA. The SIP, thus, was never valid. The Seventh Circuit, however, acknowledged that the revision or modification of a valid plan must be approved by the EPA to become effective, 716 F.2d at 1152. The court thus concluded that:

> Once a plan is adopted by the states and it *withstands any subsequent procedural challenge*, then § 7607(b)(1) provides that invalidation may occur only in the federal appellate courts.

Id. (emphasis in original).

The present suit, unlike *Sierra Club*, concerns invalidation of a SIP on technical grounds by a state court. Thus, even under the language of *Sierra Club*, such invalidation cannot be given effect, because invalidation of an EPA-approved SIP may only occur in the federal appellate courts on direct appeal from the Administrator's decision under § 7607(b)(1), and revisions and variances of properly promulgated SIPs require EPA approval. This case, in short, does not concern a SIP found invalid on state procedural grounds by a state court, as was the case in *Sierra Club*.[1] Nor does the fact that the consent decree in this case purported to vacate and modify the SIP as of its compliance date render it void *ab initio* in the sense described in *Sierra Club*. The mere fact that state authorities, through the discovery of subsequent technical data, or otherwise, change their views on the technological or economic feasibility of a properly adopted emission limit cannot in itself render the original emis-

[1] The government indicated at oral argument that it may take the position in future litigation that *Sierra Club* was wrongly decided. Because we find *Sierra Club* readily distinguishable, we neither approve nor disapprove its conclusion that state courts may invalidate EPA-approved State Implementation Plans on state procedural grounds.

sion limit unenforceable. As this court has stated, "the Act clearly envisions the possibility of continuous adjustments in the basic plan by the State and the EPA. If a plan became unenforceable every time such a revision became a possibility, the entire enforcement procedure of the Clean Air Act would be crippled." *Ohio Environmental Council v. United States District Court*, 565 F.2d 393, 398 (6th Cir. 1977) (citations omitted). Instead, the original emission limit remains fully enforceable until a revision or variance is approved by both the State and EPA. *Id.*

Ford raises two additional arguments. First, Ford argues that EPA is barred from asserting the validity of the SIP by the final judgment of the Michigan Circuit Court. Ford's reliance on collateral estoppel borders on the frivolous. First, it is questionable whether the consent judgment, which specifically states that it should be transmitted to EPA for approval as a SIP revision, was intended to do any more than invalidate the SIP for state law purposes. Second, it is doubtful whether EPA can be held to be in privity with the State of Michigan as required by collateral estoppel principles. Third, it is questionable whether the consent judgment on which Ford relies meets the "actual litigated" collateral estoppel requirement.

Fundamentally, however, we must find collateral estoppel inapplicable to this case, because Congress, as demonstrated above, has given EPA the final authority to approve revisions of EPA-approved SIPs. State courts thus lack the authority to invalidate EPA-approved SIPs on infeasibility grounds. *See Train v. NRDC, supra,* (existing SIP enforceable until SIP revision approved by EPA). The Clean Air Act thus modifies the operation of the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738, and determines the permissible effect of the state court judgment at issue.

Second, Ford argues that refusal to give effect to the Michigan Circuit Court judgment would violate Ford's

Fifth Amendment due process rights. Ford notes that state court is the only forum available for challenging the technological and economic feasibility of SIP provisions. Ford argues that the failure to give binding effect to the feasibility determination made by the only available forum deprives it of property without a meaningful right to be heard.

Ford's contention can best be answered by noting that the Clean Air Act envisions situations where standards currently economically or technologically infeasible will nonetheless be enforced. *See Union Electric Co. v. EPA*, 427 U.S. 246, 258-59 (1976); *National Steel Corporation Great Lakes Steel Division v. Gorsuch*, 700 F.2d 314, 324-25 (6th Cir. 1983). Congress has the authority to demand that "existing sources of pollutants either should meet the standard of the law or be closed down . . . .", regardless of whether such standards are currently feasible. S. Rep. No. 91-1196, p. 2-3 (1970), quoted in *Union Electric Co., supra*, at 259.

In addition, we note that meaningful opportunities for raising claims of technological and economic infeasibility have been provided by the Act. *See Union Electric Co., supra*, at 266-69. While the attainment of national standards remains paramount, *id.* at 268, emission sources such as Ford are offered the opportunity to have significant input on the setting of emission limits through the appropriate voicing of feasibility concerns. Ford, for example, participated in the state's promulgation of the SIP in 1979 and in EPA's approval of the SIP in 1980.

Ford's subsequent challenge of the SIP on feasibility grounds in the state court has resulted in the state proposing a revision of the SIP to EPA for approval. Thus the state court judgment, while not binding on EPA, is significant, because it has effected the first step in the revision process: the proposal of a revision to EPA by the state.

Furthermore, technical infeasibility coupled with good faith efforts can be considered by the district court as a factor mitigating against the imposition of monetary penalties in the enforcement action. On the other hand, "the absence of demonstrable good faith efforts toward compliance should serve to dampen any enthusiasm for technological and economic arguments advanced in defense of a claimed violation." *Indiana & Michigan Electric Co. v. EPA*, 509 F.2d 839, 845 (7th Cir. 1975).

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

---

84 CV 4459 DT

UNITED STATES OF AMERICA

—vs—

FORD MOTOR COMPANY,
Defendant.

MOTION

PROCEEDINGS HAD before the HONORABLE GEORGE WOODS, United States District Court Judge, at 272 Federal Courthouse on Monday, August 5, 1985.

APPEARANCES:

JOEL GROSS, ESQUIRE
Assistant United States Attorney
U.S. Department of Justice
10th and Pennsylvania NW
Room 1250
Washington, D.C. 20530

Appearing on behalf of the Government.

ROBERT A. FINEMAN, ESQUIRE
2290 First National Building
Detroit, Michigan 48226

Appearing on behalf of the Defendant.

* * * * *

[21] THE COURT: * * *

This complaint was brought at the request of the Administrator of the USEPA alleging that Ford was violating the provision of the Michigan State Implementation Plan, SIP as it is called, with the Defendant Ford pointing out that SIP was vacated in the Ford Motor Company in Ingham County in March of 1984. Ford then brought this motion for judgment on the pleadings.

Both the parties have eloquently put their positions and all their arguments on the record.

[22] The Court will concern itself with the reiteration that Ford made in its motion. The motion being based solely on the final judgment entered in the Ingham County case.

Ford states, of course, as we have heard it, makes no claim or contention upon this motion that any revised, and I'm quoting, that any revised or modified rule or compliance program was Federally effective or binding upon the EPA without EPA's approval of that program as a SIP, S-I-P, revision.

They have contended, Ford that is, that the sole issue before the Court is as the Court eloquently stated earlier is the legal effect of the State Court judgment.

The Defendant contends that since the State rule has been declared void ab initio on the grounds that such rule was improper and erroneously adopted, that this Court simply must find that binding in this action and grant summary judgment.

Ford has contended that there are three separate grounds on which the Court must grant their motion.

One, that Federal enforcement is barred as a result of the invalidation of Rule 610 by the State Court.

Second, that the Plaintiff is estopped by the State Court judgment from asserting the validity of Rule 610 under the doctrine of full faith and credit res judicata and collateral estoppel. And, third, enforcement by this

Court [23] Rule 610 would be a denial of Ford's constitutional due process rights.

In response and in reply memorandum and in their argument, the Defendant Ford has sought to show that the Plaintiff's reliance on the *Sierra, Indiana* case and the *Illinois Celotex* case is and has been misplaced. And, also cuts both ways actually.

The Plaintiff relied on these two cases for support, and the Defendant contends also that the *Indiana-Kentucky* case supports its position. And, the Defendant quotes the following in *Sierra Club*, the Seventh Circuit found that a Federally approved SIP was no longer enforceable since it had been invalidated by a State Court on the ground that it had not been properly promulgated in the first place.

Well, of course Plaintiff contends that SIP was properly promulgated in the first instance where the Defendant points out that the consent final judgment held that Rule 610 was promulgated on the erroneous assumption and belief that it represented reasonably available controlled technology.

The Defendant contends that the SIP invalidated on substantive rather than procedural grounds cannot remain Federally enforceable. And, that Plaintiff has been unable to find any case law in support of such a position.

And, Mr. Fineman also points out that the proper[24] procedure in such a case is to first address the invalidity of State promulgated State regulations in a State Court.

He also pointed out the fact that this was—in effect that this was a consent judgment should absolutely and in no way diminish the result.

In his reply brief memorandum, the Defendant reiterated previous argument in fuller fashion, again pointing to the res judicata collateral estoppel and full faith and credit and demands that the Court find in its favor.

The Court is convinced of the soundness of the prior State Court proceeding, and the consent final judgment, and finds in favor of Ford and grants the motion.

It appears to this Court Ford was following the proper procedure in first taking the SIP in the State Court as it should have effect and binding.

Mr. Fineman, prepare a proper order after you do business with Mr. Gross who has come all the way from Washington, and see if you can settle this and have the proposed order in to Ms. Henson by one o'clock Friday.

MR. FINEMAN: I will certainly try to do that, sir.

THE COURT: All right.

(Motion concluded.)

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 84-CV-4459-DT
HON. GEORGE E. WOODS

UNITED STATES OF AMERICA,
Plaintiff and
Counterdefendant,

v.

FORD MOTOR COMPANY,
Defendant and
Counterplaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Additional
Counterdefendant.

[Filed Aug. 14, 1985]

JUDGMENT OF DISMISSAL OF PLAINTIFF'S COMPLAINT

This matter having come on before the Court upon the motion of defendant Ford Motor Company for judgment on the pleadings and Ford having submitted its motion and brief in support thereof and plaintiff United States of America having submitted its brief and the affidavit of William L. MacDowell in opposition and Ford having submitted its reply memorandum and the parties

having appeared before the Court for oral argument on August 5, 1985 and the Court having heard such argument and being otherwise fully advised in the premises and the court having determined, for the reasons set forth by the Court on the record on August 5, 1985 that Ford's motion should be granted now, therefore;

IT IS HEREBY ORDERED AND ADJUDGED that the complaint of the United States of America and each count and claim for relief therein is hereby dismissed with prejudice.

/s/ George Woods
U.S. District Court Judge

APPROVED AS TO FORM:

HONIGMAN MILLER SCHWARTZ AND COHN
Attorneys for Defendant

By /s/ Robert A. Fineman
ROBERT A. FINEMAN
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JOEL M. SHERE
United States Attorney

By /s/ Geneva S. Halliday
GENEVA S. HALLIDAY
Assistant U.S. Attorney
817 Federal Building
Detroit, Michigan 48226
(313) 226-2163

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 84-CV-4459-DT

HON. GEORGE E. WOODS

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FORD MOTOR COMPANY,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 27th day of September, 1985.

PRESENT: THE HONORABLE GEORGE E. WOODS
United States District Judge

This matter having come before the Court on plaintiff's Motion for Reconsideration and Modification;

The Court having reviewed the pleadings submitted herein, and responses and replies thereto, and being otherwise fully informed in the premises;

IT IS HEREBY ORDERED that plaintiff's motion be and the same is DENIED, the Court determining that its prior ruling on the defendant's Motion for Summary Judgment was correct as ordered. The Court is per-

suaded that the State Court Judgment vacated the entire vinyl coating standard contained in Rule 610, as shown by the express findings:

> . . . the Vinyl Limit was (and is) not achievable through the use of reasonably available control technology.

Stipulation for Entry of Consent Order and Final Order, Paragraph 6, February 1, 1985. Although the above language refers specifically to Lines 7 and 8, the Court finds that the language contained in the Final judgment, *Ford Motor Company* v. *Michigan Air Pollution Control Commission*, No. 84-53025-CZ (Cir. Ct. Ingham County, March 18, 1985), adopting the Findings of Fact Nos. 4, 5, 6 and 7 of the Stipulation for Entry of Consent Order and Final Order, February 1, 1985, mandates a finding that Table 63, Rule 336.1610, is vacated in regard to the Ford Motor Company Mt. Clemens Vinyl Plant, and all existing vinyl lines therein that facility.

So ordered.

/s/ George E. Woods
GEORGE E. WOODS
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-1945

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

FORD MOTOR COMPANY,
Defendant-Appellee.

Before: ENGEL and JONES, Circuit Judges; and EDWARDS, Senior Circuit Judge.

[Filed Mar. 27, 1987]

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby reversed and the case is remanded for further proceedings consistent with this opinion.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

Issued as Mandate:

COSTS:

Filing fee .....$
Printing .....$

Total .....$

APPENDIX F

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF INGHAM

HON. THOMAS L. BROWN

File No. 84-53025-CZ

FORD MOTOR COMPANY, a Delaware Corporation,
Plaintiff,

vs.

MICHIGAN AIR POLLUTION CONTROL COMMISSION, MICHIGAN NATURAL RESOURCES COMMISSION and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
Defendants.

CERTIFICATE UNDER 28 USC § 1738

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan on May 20, 1985

PRESENT: HON. THOMAS L. BROWN
Circuit Court Judge

NOW COMES the Honorable Thomas L. Brown, Circuit Court Judge of Ingham County, Michigan, and hereby certifies that the attestation, dated May 20, 1985, by County Clerk, Lingg Brewer, on the attached Judgement is in the proper form. The attached Final Judgment was entered on March 18, 1985 in the above-captioned case by the Honorable Thomas L. Brown.

/s/ The Honorable Thomas L. Brown
THE HONORABLE THOMAS L. BROWN
Circuit Court Judge

Drafted by: Gary A. Trepod (P-21561)
Honigman Miller Schwartz and Cohn
Michigan National Tower, Suite 636
Lansing, Michigan 48933
(517) 484-8285

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF INGHAM

File No. 84-53025-CZ

FORD MOTOR COMPANY, a Delaware Corporation,
Plaintiff,

vs.

MICHIGAN AIR POLLUTION CONTROL COMMISSION, MICHIGAN NATURAL RESOURCES COMMISSION and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
Defendants.

FINAL JUDGMENT

At a Session of the Circuit Court Held in the City of Lansing on March 18, 1985.

PRESENT: THE HONORABLE THOMAS L. BROWN
Circuit Judge

Upon the joint Motion for Entry of Final Judgment, it is the judgment of this Court that the agreement of the parties, as reflected in the Stipulation for Entry of Consent Order and Final Order, a copy of which is attached as Exhibit A, and which is hereby incorporated by reference, is an appropriate resolution of the dispute between the parties.

NOW THEREFORE:

It is Ordered and Adjudged that the "Stipulation for Entry of Consent Order and Final Order" of the Michigan Air Pollution Control Commission, SIP No. 1-1985, is hereby AFFIRMED and that Findings of Fact Nos. 4, 5, 6, and 7 made therein are adopted by the Court.

It is Further Ordered and Adjudged that pursuant to 1969 PA 306, as amended, § 106 (2), MCL 24.306:

1) The Ford Motor Company shall fully comply with the abatement program set forth in the "Stipulation for Entry of Consent Order and Final Order" of the Michigan Air Pollution Control Commission.

2) Table 63, of R 336.1610, of the rules of the Michigan Air Pollution Control Commission is hereby vacated and modified, with regard to the Ford Motor Company Mt. Clemens Vinyl Plant, to define reasonably available control technology, after December 31, 1982, as the emission control program set forth in the "Stipulation for Entry of Consent Order and Final Order" of the Michigan Air Pollution Control Commission.

It is Further Ordered that no costs are awarded, a public question being presented.

/s/ The Honorable Thomas L. Brown
THE HONORABLE THOMAS L. BROWN
Circuit Judge

Approved As to Form:

FRANK J. KELLEY
Attorney General

By /s/ Stewart H. Freeman
STEWART H. FREEMAN
Assistant Attorney General
in Charge
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HONIGMAN MILLER SCHWARTZ
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By /s/ Robert A. Fineman
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(313) 256-7722

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF INGHAM

File No. 84-53025-CZ

FORD MOTOR COMPANY, a Delaware Corporation,
Plaintiff,

vs.

MICHIGAN AIR POLLUTION CONTROL COMMISSION, MICHIGAN NATURAL RESOURCES COMMISSION and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
Defendants.

STIPULATION

The parties stipulate and agree as follows:

1. Entry of Final Judgment in the form attached hereto as Exhibit I shall be sought based upon the following record:

a. Stipulation for Entry of Consent Order and Final Order of the Michigan Air Pollution Control Commission, SIP No. 1-1985, a copy of which is attached hereto as Exhibit II.

b. Michigan Department of Natural Resources Air Quality Division's Staff Activity Report dated January 15, 1985, a copy of which is attached hereto as Exhibit III.

c. Comments of Ford Motor Company dated January 8, 1985, attached hereto as Exhibit IV.

d. Comments of United Automobile, Aerospace, Agricultural Implement Workers of America (UAW) dated January 7, 1985, attached hereto as Exhibit V.

e. Transcript of proceedings held before the Michigan Air Pollution Control Commission on January 15, 1985 at a public hearing, a copy of which is attached hereto as Exhibit VI, which the parties agree is an accurate record of the proceedings held before the Michigan Air Pollution Control Commission at the public hearing on January 15, 1985.

FRANK J. KELLEY
Attorney General

By /s/ Stewart H. Freeman
STEWART H. FREEMAN
Assistant Attorney General
in Charge
Environmental Protection Division
720 Law Building
Lansing, Michigan 48913
(517) 373-1110

HONIGMAN MILLER SCHWARTZ
AND COHN

By

ROBERT A. FINEMAN
2290 First National Building
Detroit, Michigan 48226
(313) 256-7722

Dated: March 13, 1985

STATE OF MICHIGAN
DEPARTMENT OF NATURAL RESOURCES
AIR POLLUTION CONTROL COMMISSION

SIP No. 1-1985

In the matter of administrative proceedings against FORD MOTOR COMPANY, a corporation organized under the laws of the State of Delaware and doing business at 151 Lafayette, City of Mt. Clemens, County of Macomb, State of Michigan.

STIPULATION FOR ENTRY OF CONSENT ORDER AND FINAL ORDER

This proceeding resulted from allegations by the staff of the Air Quality Division of the Department of Natural Resources (hereinafter referred to as the "Staff"). The Staff alleges that Ford Motor Company, a Delaware corporation (hereinafter referred to as the "Company"), located at 151 Lafayette, City of Mt. Clemens, County of Macomb, State of Michigan, is emitting volatile organic compounds (VOCs) from its Mt. Clemens vinyl Plant (hereinafter the "Plant") which are in excess of allowable limits as established by Administrative Code 1980 AACS, R. 336.1610 and Stipulation for Entry of Consent Order and Final Order No. 24-1982. The Company and the Staff agree to the termination of this proceeding by entry of a Final Order by consent.

The Company and the Staff agree as follows:

1. The Company admits that the Chief of the Air Quality Division of the Department of Natural Resources

is authorized by resolution of the Air Pollution Control Commission (hereinafter "Commission") adopted June 28, 1977, as agent of the Commission to enter into this Final Order by consent.

2. The Company stipulates that the Chief of the Air Quality Division of the Department of Natural Resources is charged with the investigation and enforcement of all orders, regulations, rules, standards and statutes of the State of Michigan concerning the emission and control of air contaminants.

3. The Company stipulates that the termination of this matter by a Final Order to be entered as a Consent Order is proper and acceptable.

4. The Company and the Staff agree to the following findings:

(a) R 336.1610 prohibits emission of VOC from the coating of vinyl from any existing coating line in excess of equivalent emission rates as shown in Table 63.

(b) Table 63, contained within R 336.1610, provides that after December 31, 1982, the allowable emission rate for the coating of vinyl is 4.5 pounds of VOC per gallon of coating (minus water) as applied (the "Vinyl Limit").

5. In adopting the Vinyl Limit, which was recommended by the Staff, the Commission believed that they were imposing a requirement which was technologically and economically feasible; that is, requirement that was achievable through the use of reasonably available control technology.

6. Based on the Staff's review of technical and economic data for Coaters 7 and 8 and upon the Commission's hearing of testimony from the Staff and the Company, the Commission finds that for Coaters 7 and 8,

the Vinyl Limit was (and is) not achievable through the use of reasonably available control technology.

7. Based upon the Staff's review of all technical and economic data, and upon the hearing of testimony from the Staff and the Company, the Commission finds that the emission control program set forth and agreed to below does represent emission limits which are achievable through the use of reasonably available control technology.

8. The Company and the Staff agree that the signing of this Stipulation is for settlement purposes only and does not constitute an admission by the Company that the law has been violated. Both Staff and the Company agree that the VOC emissions from the vinyl coating operations should be abated in accordance with the following schedule:

(a) With the effective date of this Order and until November 30, 1985, the VOC emissions from each of the Vinyl Coaters 1, 5 and 10 shall not exceed 84 pounds per gallon of solids applied, based on a 15-day averaging period, nor exceed 117 pounds per gallon of solids applied, based on a 24-hour averaging period.

(b) With the effective date of this Order, the VOC emissions from Vinyl Coater 7 shall not exceed 46 pounds per gallon of solids applied, based on a 15-day averaging period, nor exceed 55 pounds per gallon of solids applied, based on a 24-hour averaging period.

(c) With the effective date of this Order, the VOC emissions from Vinyl Coater 8 shall not exceed 47 pounds per gallon of solids applied, based on a 15-day averaging period, nor exceed 51 pounds per gallon of solids applied, based on a 24-hour averaging period.

(d) With the effective date of this Order, the VOC emissions from the cast line shall not exceed 9.0 pounds per gallon of solids applied, based on a 15-day averaging period, nor exceed 11.0 pounds per gallon of solids applied, based on a 24-hour averaging period.

(e) By June 30, 1985, the Company shall permanently discontinue operation of Vinyl Coaters 1 and 5 and shall not resume operation of such vinyl coaters unless an approved Permit to Install is issued by the Commission.

(f) By November 30, 1985, the Company shall permanently discontinue operation of Vinyl Coater 10 and shall not resume operation of such coater unless an approved Permit to Install is issued by the Commission.

(g) Beginning January 1, 1986, the total annual VOC emissions from all of the vinyl coaters at the Plant shall not exceed 440 tons.

(h) The Company shall take all steps necessary to assure continuous compliance with the VOC emission limitations specified in paragraphs 8 (a) through 8(f), above. These steps shall include, but are not limited to, production curtailments and the utilization of Vinyl Coaters 7, 8 and 11 to the greatest extent possible.

(i) With the effective date of this Order, the Company shall submit a report to the Staff every three (3) months demonstrating compliance with the emission limits of this Order in a format acceptable to the Staff. These reports shall also provide documentation of the quantities and volatile organic compound content of coatings used on each coater and shall be submitted within 30 days following the end of the calendar quarter.

(j) With the effective date of this Order, the Company shall permanently discontinue operation of Vinyl Coaters 2, 3 and 9 and shall not resume operation unless an approved Permit to Install is issued by the Commission.

9. The Company and the Chief of the Air Quality Division of the Department of Natural Resources agree that this Consent Order, the supporting data, and all necessary data that may be requested by the U.S. Environmental Protection Agency which is available to the Staff or provided by the Company shall be transmitted to the U.S. Environmental Protection Agency for approval as a revision to the Michigan State Implementation Plan.

10. Nothing contained herein shall be considered a waiver of any claim or defense asserted by the Company in *United States of America* vs. *Ford Motor Company*, United States District Court Civil Action No. 84CV4459 DT(ED MICH, SD).

11. The Company and the Commission agree that this Consent Order shall rescind and supersede Consent Order No. 24-1982.

12. The Staff and the Company do not regard this abatement program as a variance subject to the 12-month limitation specified in Section 22 of the Air Pollution Act, being MCLA 336.32. Approval of this abatement program is not a major state action for purposes of further environmental review pursuant to Executive Order 1974-4.

13. Staff and the Company both acknowledge that a public hearing on this abatement program was held on January 15, 1985. Both Staff and the Company consent to enforcement of this Stipulation and Final Order in the same manner and by the same procedures for all final orders entered pursuant to Section 16 of 1972 PA 257,

MCLA 336.26; MSA 14.58(16), including enforcement pursuant to 1970 PA 127, MCLA 691.1201 et.seq.; MSA 14.528(201) et.seq.

Approved as to Form and Content:

/s/ [Illegible]
FORD MOTOR COMPANY

Dated: Jan. 29, 1985

/s/ Norman W. Bernstein
NORMAN W. BERNSTEIN
Associate Counsel
FORD MOTOR COMPANY

Dated: ————

Approved as to Content:

/s/ Robert P. Miller
ROBERT P. MILLER
Chief
AIR QUALITY DIVISION
DEPARTMENT OF NATURAL RESOURCES

Dated: 2/1/85

Approved as to Form:

/s/ Stewart H. Freeman
STEWART H. FREEMAN
Assistant Attorney General
DEPARTMENT OF ATTORNEY GENERAL

Dated: February 1, 1985

FINAL ORDER

This Commission having had opportunity to review the above stated Stipulation for Entry of Consent Order, and this Commission having authorized the Chief of the Air Quality Division of the Department of Natural Resources as agent of the Commission to enter into consent orders,

IT IS ORDERED that this Consent Order is approved and shall be entered in the record of this Commission as a Final Order.

AIR POLLUTION CONTROL COMMISSION

By: /s/ Robert Miller
ROBERT P. MILLER
Chief
Air Quality Division
Department of Natural Resources

Dated: 2/1/85

MICHIGAN DEPARTMENT OF NATURAL RESOURCES AIR QUALITY DIVISION STAFF ACTIVITY REPORT

January 15, 1985

Respondent

Ford Motor Company
Mount Clemens Vinyl Plant
Mount Clemens, Michigan

Purpose

Commission consideration of a new Consent Order and Final Order to resolve the ongoing violations of Consent Order Sip No. 24-1982 and Michigan Air Pollution Control Commission (MAPCC) Rule 610 by providing for the control of volatile organic compound (VOC) emissions from the plant's vinyl coating operations. If approved by the Commission the Order will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP).

Description of Source

The plant operates coating lines for the coating of vinyl fabrics to be used in automobile seats, headliners and other automotive applications. A wide variety of fabrics and coatings are used. The coating lines at the plant are designated as lines 1, 2, 3, 5, 7, 8, 9, 10, 11, and the cast line. Lines 1, 2, 3, 5, 9, and 10 are currently uncontrolled. Lines (coaters) 7 and 8 are controlled by liquid based nitrogen condensation processes which recover solvents. The cast line is controlled by a thermal incinerator. Coater No. 11 was installed in 1977 and is also controlled by an afterburner.

Applicable Rule

For vinyl coating operations, Rule 610 limits the emission rate to 4.5 pounds of VOC per gallon of coating (minus water) as applied. Compliance is required with this rule on and after December 31, 1982.

History

The vinyl plant operated by Ford in Mount Clemens is the only vinyl coating operation in the state subject to the 4.5 pounds per gallon limit. Therefore, the limit was based specifically on a Reasonably Available Control Technology (RACT) evaluation of the Mount Clemens plant using information and data available in the mid to late 1970s. A letter from staff to Ford dated March 5, 1979, however, acknowledged that the 4.5 limit may not represent RACT for this plant and staff expected additional review of the limit. It should be noted that the limit recommended to the states by the EPA for adoption was 3.8 pounds of VOC per gallon of coating as applied, and therefore, the 4.5 limit had to be justified technically to EPA in the 1979 SIP submittal. The 4.5 limit was formally approved by EPA as part of the SIP on May 6, 1980.

Staff, in review of the company's compliance program, thoroughly re-evaluated all of the existing vinyl coaters (and cast line) in terms of what is RACT for each coater. After a technical review focusing on the cost and energy problems associated with possible control systems in the coaters, staff concluded that the limit of 4.5 pounds per gallon, as applied, or equivalent, could not be reasonably met by every coater so "Stipulation for Entry of Consent Order and Final Order, SIP No. 24-1982" was approved May 5, 1983. This Order set forth a schedule for the installation of control equipment on coaters 7 and 8. The Order further required a 250 ton reduction of VOC emissions from other uncontrolled coaters by December 31, 1985.

SIP No. 24-1982 required the company to submit compliance status reports to staff each quarter. In late 1983, the company began upgrading their computer program to utilize more detailed information to calculate emission rates. These new quarterly reports indicated that the company exceeded limits set forth by SIP No. 24-1982, specifically for coaters 7 and 8. Negotiations to revise SIP No. 24-1982, between staff and the company began on February 7, 1984.

On April 19, 1984 the EPA issued a Notice of Violation to the company for violating MAPCC R336.1610 (part of a federally approved implementation plan). Negotiations between staff and the company and EPA continued through the summer.

On September 26, 1984, the United States Justice Department filed a complaint against the company for violating MAPCC R336.1610. In turn, on October 16, 1984 the company filed a suit against MAPCC, Michigan Natural Resources Commission and Michigan Department of Natural Resources seeking injunctive relief and civil penalties for violation of Michigan State Implementation Plan R336.1610.

Staff and the company continued negotiations and agreed on the major issues as summarized below. This agreement forms the basis for the new proposed order.

1. The allowable emission rate for the coating of vinyl of 4.5 pounds of VOC per gallon of coating (minus water), as applied, is not achievable through the use of RACT specifically for coaters 7 and 8. The new limits not to be exceeded which would constitute RACT are: 46 pounds per gallon of solids applied, based on a 15-day averaging period and 55 pounds per gallon of solids applied based on a 24-hour averaging period for coater No. 7; and 47 pounds per gallon of solids applied, based on a 15-day averaging period and 51 pounds per gallon of solids applied based on a 24-hour averaging period for coater 8.

2. The company will permanently discontinue operation of the uncontrolled vinyl printers as follows: June 30, 1985 for coaters 1 and 5; November 30, 1985 for coater 10; and the effective date of this Order for coaters 2, 3, and 9; unless an approved Permit to Install is issued by the Commission.

3. Total annual VOC emissions from all of the vinyl coaters at the company shall not exceed 440 tons by January 1, 1986.

4. The proposed Consent Order also includes record keeping and reporting requirements to demonstrate compliance with the terms of the Order.

Revision to the SIP

Because the proposed Order reflects limits that are different than those in the currently approved Michigan SIP, the order must be submitted to EPA as a revision to the SIP. Such "site-specific" SIP revisions for existing sources must meet certain criteria in order to be approvable. Those criteria include:

1. Documentation of why the revised emission limits reflect RACT.

2. Documentation of why the compliance dates are as "expeditiously as practicable".

3. An analysis based on modeling which shows that with the revised compliance program contained in the Order, the overall demonstration of attainment in the SIP will continue to provide for attainment by the deadline mandated by the Clean Air Act (in this case, December 31, 1987).

The information for the above three areas will be documented in detail as part of a separate report which will accompany the Order as part of the formal SIP submittal to EPA. To summarize, the company has provided staff with information for printers Nos. 7 and 8 which

indicate that the cost to provide any controls in addition to the liquid based nitrogen condensation systems which are currently utilized would be disproportionate to the amount of VOC emission reductions to be gained from such additional controls. Regarding printers 1 and 5, and 10, which will discontinue operation by June 30, 1985, and November 30, 1985, respectively, documentation in the SIP submittal will focus on the unreasonableness of installing air pollution controls for such a short duration of time. The plantwide emission limitation included in the order will be made a part of the 1982 ozone SIP for the Detroit urban nonattainment area which will be formally submitted to EPA in early January 1985 and, therefore, will parallel this site-specific SIP revision.

Recommendation

Staff recommends entry of the attached proposed Consent Order which provides for a schedule for the vinyl coating operation at the Ford Motor Vinyl Plant in Mount Clemens.

Submitted by: Ann Peppo

December 21, 1984

AP:jh

Attachment

bcc: N. Bernstein
S. Kehres
D. Schultz
D. Voita
D. Vonk

[FORD LOGO]

V. H. Sussman, Director
Stationary Source Environmental Control
Environmental and Safety Engineering

Ford Motor Company
One Parklane Boulevard
Dearborn, Michigan 48126

January 8, 1985

Mr. Robert P. Miller, Executive Secretary
Michigan Air Pollution Control Commission
P.O. Box 30028
Lansing, MI 48909

Subject: Ford Mt. Clemens Vinyl Plant—Proposed Consent Order

Dear Mr. Miller:

Pursuant to the Notice of Air Pollution Hearing dated December 10, 1984, the Company hereby submits brief comments on the proposed order. In general, Ford supports and accepts the entry of the Proposed Order (with our recommended corrections) and supports the recommendations contained within the Staff Activity Report.

In addition, although Ford generally agrees with the conclusions and recommendations of the staff, some comment, correction and addition is necessary to the staff report. We have also included such information so that the Commission may have a more complete picture of the Plant's emission control efforts. Copies of these comments and

information are being forwarded directly to the members of the Commission for their review.

Sincerely,

/s/ Victor H. Sussman

cc: Members, Michigan Air Pollution Control Commission

Attachment

9A:FPP195/L

January 8, 1985

Attachment I

Comments of Ford Motor Company
Mt. Clemens Vinyl Plant
Proposed Consent Order (Fifth Draft—11/30/84)

Ford Motor Company ("Ford") files these comments on the proposed Order regarding volatile organic compound emissions from its Mt. Clemens Vinyl Plant, upon which a public hearing is scheduled for January 15, 1985.

1. Paragraph 8(g), p. 4.

Substitute "Beginning" for the word "By", so as to read: "Beginning January 1, 1986. . . ."

The purpose of this change is to more clearly state the intent of this paragraph that the production limiting annual emission cap applies in calendar year 1986 and thereafter. As now worded, it could be construed that the 440 TPY emission level will have been achieved before, or in 1985.

2. Paragraph 10, p. 4.

The U.S. District Court Civil Action citation should be corrected to read "84 CV" not "84 CB."

Based on informal contact with MDNR and the Attorney General's Office Staff, it is the Company's understanding that the above two recommended changes are acceptable. Ford respectfully requests that the Michigan Air Pollution Control Commission adopt and enter the proposed Order, including the above recommended changes.

January 8, 1985

Attachment II

Comments and Supplemental Information by
Ford Motor Company Mt. Clemens Vinyl Plant
with Respect to the Staff Activity Report dated
December 24, 1984 by the Air Quality Division,
Michigan Department of Natural Resources

Ford supports the recommendations contained within the Staff Activity Report. In addition, although Ford generally agrees with the conclusions and recommendations of the staff, some comment, correction and addition is necessary to the Staff Report. There are four basic points that need to be made. First, Ford has already reduced VOC emissions by more than 80% from the plant. Second, we do not agree that there are any violations. Third, we are submitting herewith additional data in support of the findings in paragraphs 6 and 7 of the proposed Order. Fourth, entry of the proposed Order is important to minimizing the loss of jobs in the State of Michigan, while at the same time assuring that the facility will surpass all air pollution control objectives. We will address each of these points below.

1. By a combination of installation of control equipment, process and scheduling changes, retirement of certain printers and reduction of production, costing in excess of $6.65 million (set forth in more detail below), emissions of volatile organic compounds from the Mt. Clemens Vinyl Plant have been reduced by over 80% from 1977 to the present (from more than 3700 tons per year in 1977 to less than 700 tons in 1984 from vinyl coating operations).

Pursuant to the terms of the proposed Consent Order, after January 1, 1986, emissions will be 88% below 1977 levels. This reduction exceeds the goals for reductions recommended by the USEPA for this industry.

2. Ford Motor Company does not agree that any violation of a valid existing law or regulation has been established (as stated under "Purpose," Staff Activity Report). To the extent that compliance is measured by a rate of emission calculation using the so-called "hypothetical gallon" method, the regulation and such calculations are invalid. The plain language of existing Rule 610 requires only a reduction in the rate of emissions based on coatings "as applied." It has been, and is, our view that Ford has achieved compliance, even with the rate limitations set forth in the Rule, on a plantwide annual basis using the plain language of the Rule.

The allegation that Ford may be in violation of the original Rule 610 is apparently based on a "hypothetical gallon" method of calculating emission rate. The "hypothetical gallon" method is not set out in the Rule, and if used, the rate limitations in the Rule are beyond reasonably available control technology (RACT) at least as applied to printers 7 and 8.

Nor does Ford Motor Company agree that noncompliance has been established with regard to the prior Consent Order covering vinyl coating operations at the Mt. Clemens Plant. To the extent that a different rate type calculation was included, the limits set in the original Order assumed a 90% capture efficiency for control equipment—an efficiency which is not achievable as RACT either (see pages 6-8 for these comments).

3. In an effort to assist the Commission, and to supplement the information set forth in the Staff Activity Report, the following information is provided in support of paragraphs 6 and 7 of the proposed Consent Order (also refer to Staff Activity Report, p. 3) which addresses the establishment of a site-specific RACT VOC emission control program for Printer Nos. 7 and 8.

A brief review of the nature of Mt. Clemens Vinyl Plant ("the Plant") production and development of vinyl coating VOC limits is instructive. The Plant uniquely

manufactures coated sheet vinyl for 100% automotive applications, unlike competitors with diversified products such as wallpapers, furniture covers, etc. Ford's automotive vinyls have more demanding product quality specifications than ordinary commercial vinyl due to the need to withstand exposure to harsh weather conditions and still retain an attractive appearance. These requirements limit the type of coatings that can be used. The plant uses over 500 different coating formulas (all solvent-based with relatively low solids content) complicating reconversion just on sheer numbers.

Following the 1977 Clean Air Act amendments, EPA provided "guidance" to states through Control Technology Guidelines ("CTG's") for development of VOC emission limits. These CTG's were hastily prepared, often by outside contractors, were not subjected to any formal public comment, and often contained inaccurate information. The USEPA, during development of its CTG for vinyl coating, never visited nor requested information from Ford with respect to its unique vinyl plant circumstances. Based on data from other vinyl coaters and a certain set of assumptions, it suggested that a limit of 3.8 pounds of VOC per gallon of coating (as applied) represented RACT. The USEPA assumptions were that (1) 90% of fugitive solvent losses in the plant could be captured—the so-called "capture efficiency," and (2) 90% of the solvent captured could be recovered or controlled. The combined effect of these two asumptions was that 81% overall emission control, EPA assumed, represented RACT [(0.90 x 0.90) x 100 = 81%]. When Michigan adopted Rule 610, based on data Ford submitted related to its coatings, a limit of 4.5 pounds of VOC per gallon was established. Subsequent interpretation of that value and the difference of opinion on the extent of emission control required resulted in the Consent Order entered into in 1982.

Original Consent Order. Confronted with the necessity to try to meet this new regulatory requirement, the Plant

had limited options—it could develop higher solids coatings, convert to waterbased coatings, or install control hardware.

Due to the nature of the vinyl coating process (rotogravure), coatings with high solids content reflecting 4.5 pounds VOC per gallon coating are not usable. The Plant had done considerable developmental work on waterbased coatings, which at that time, were not commercially available, and concluded that none could be developed in the time framework allowed that would meet both the VOC emission limits and Ford's stringent product quality demands. Further, the Plant did not have the flexibility as did others with varied products (like vinyl wall coverings) to convert some printers to waterbased coatings and average the emissions from the waterbased and solvent based coatings. Accordingly, the control hardware option was then selected and, reflecting the economic hardship imposed by an across-the-board application to all printers, a VOC control "bubble" was proposed to and approved by the Commission (SIP No. 24-1982) on November 30, 1982. The major provisions of that order are as follows:

- By December 31, 1982—for controlled printers 7 and 8—allowable emissions of 13.5 lbs. VOC/gal. solids applied, 24-hour average (to be adjusted following new control equipment performance testing). This value was based upon an expected 81% emission reduction from the 1977 plantwide *average* emission rate.
- By December 31, 1982—for uncontrolled vinyl coaters 1, 2, 3, 5, 9 and 10—allowable emissions of 76 lbs. VOC/gal. solids applied (15-day moving average), 120 lbs. VOC/gal. solids applied (max. 24-hour average).
- Provide additional 250 ton-per-year emission reduction after December 31, 1985 through use of alternate coatings or installation of hardware.

- Submit quarterly reports of emission data.

The Company met every stipulated commitment date in the Order:

- Installation of innovative control technology equipment on printers 7 and 8 was completed before 12/31/82, at a cost of approximately $3 million. However, as explained below, the required VOC emission rate of 13.5 pounds per gallon solids applied was not achieved.

- The allowed rates for uncontrolled printers was initially met. With time, the 76 pounds VOC per gallon solids (15-day average) increased slightly due to the introduction of a process change and refinement of the data base used to calculate plantwide VOC rates.

- A VOC emission reduction in excess of the 250-ton reduction prescribed in the Order was accomplished at the Plant more than two (2) years earlier than required at a cost of $3 million. It was the result of a process change ("embossed last") which eliminated one of three coatings previously applied to a majority of the Vinyl Plant's products. Approximately 450 tons per year in VOC usage were removed from the Plant by this effort. An ironic effect of this process change was that the plantwide VOC emission *rate*, expressed as an average, increased slightly because the coatings removed from the process contained less VOC than the coatings which remained. Thus, even though mass emissions were reduced substantially, the rate of emission, on average, increased about 8% (from 74 to 80 lbs. VOC per gallon of solids applied). This fact is not recognized in the Staff Activity Report. Although an extraordinary effort in manpower was expended to refine our computer program, using individual raw materials and their

respective specific gravities (instead of an average specific gravity) for about 500 different formulations, it was the process change described above and not an improvement in reporting accuracy which caused the Plant's emission rate to increase.

- All quarterly emission data reports have been and continue to be submitted.

Given the past history, attention is now focused on why the Plant's accomplishments to date with respect to the controlled printers (Nos. 7 and 8) and the revised VOC emission limits in the proposed Order represent RACT (or conversely why Rule 610, and the original Order are *not* RACT). Experience gained with the installed control technology and its testing has revealed the shortcomings of the USEPA assumptions behind its 81% reduction as RACT. The USEPA defines RACT as:

> "the lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering *technological and economic feasibility*" (emphasis supplied).

Technology infeasibility. Pursuant to the original Order, the Plant installed innovative control technology on Printer Nos. 7 and 8, known as the Airco inert gas/solvent recovery system. It uses an inert gas (nitrogen) oven atmosphere to enrich the solvent loading, which atmosphere is continuously bled off to a condenser for solvent recovery, and recycled. Ford had made one of the first installations of this technology in the country.

The Airco systems were installed on time and tested for performance. Results were surprising in that only 43% overall VOC control on average was demonstrated. This was not the result of poor condenser performance which by itself achieved 96% control of inlet solvent vapor. An investigation followed and a number of modifications to the original design and operating conditions

was undertaken. The system was retested. Significant improvements resulted, and overall capture was increased on average to 53% for Printer No. 7 and 57% for Printer No. 8. This appears to approach the expected upper limit of performance given the nature of the system. Further examination of the test results, in the form of a mass balance, showed that VOC losses are inherent in the process in two areas—fugitive losses from printer applications and from the ovens, and solvent carry-out on the printed vinyl product.

With respect to fugitive losses, the mass balance showed that about 25% by weight of the solvent is lost. It is not possible based on current information to allocate these losses between the printer and the oven. The printer stations are fully enclosed and efforts are made to operate them at slightly negative pressure. Pressure control of the nitrogen atmosphere oven is necessary to prevent in-leakage of oxygen to the VOC rich environment, but control is difficult and some leakage does occur. The amount of fugitive loss is in agreement with extensive tests conducted by the Radian Corporation for US EPA at another vinyl facility.

The mass balance also revealed that about 15 percent of the solvent applied to the vinyl is retained on the coated product. This phenomenon was not anticipated and shows that even if all the fugitive emissions could be controlled, the capture efficiency at best would be 85 percent, or less than what EPA's CTG for vinyl coating anticipated.

The folowing is a block diagram showing the typical emissions from the solvent recovery system assuming a solvent loading of 100 pounds:

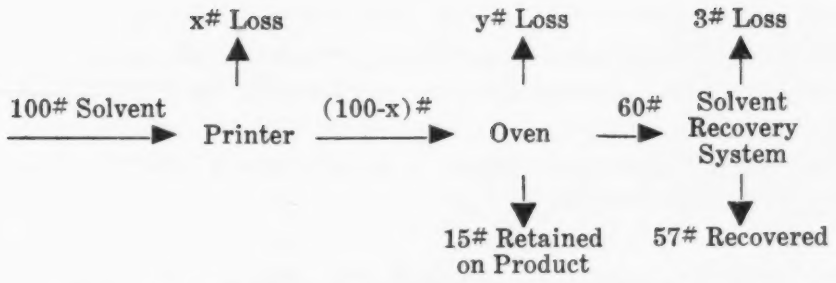


Figure 1. Diagram Showing Typical Emissions from Solvent Recovery System

1) $100 - x = y + 60 + 15$

2) $x + y = 100 - (60 + 15) = 25\#$ VOC (fugitive losses)

The Company believes that Printer Nos. 7 and 8 have been optimized and are currently operating at a maximum solvent control efficiency for which this type of solvent recovery system is technically and reasonably capable.

It is evident from the test data accumulated, that the optimum control efficiency for vinyl coating, considering retrofitting an existing printer-oven with some type of control system will not reach the 81% level expected, due to the inability to capture anything like 90% of the fugitive VOC emissions and remove all the residual solvent from the coated product before it leaves the oven. In the case of the Mt. Clemens Vinyl Plant, using EPA's combined efficiency approach, the optimum performance for its system is estimated as:

60%	x	96%	=	57%
(capture efficiency)		(control efficiency)		(overall VOC control)

Importantly, due to retention of residual VOC in the product, the substitution of incineration (or other technology) would not significantly improve this overall performance for existing coating lines. Therefore, it is Ford's contention that the existing control system is "technologically speaking" RACT.

Economic Unreasonableness. "Cost-effectiveness" or the cost to control one ton of VOC emissions is an accepted gage of RACT in an economic sense. The USEPA considers costs exceeding a range of $3,000-$5,000 per ton unreasonable, and therefore "non-RACT." In the case of the Mt. Clemens Vinyl Plant Printer Nos. 7 and 8, VOC emissions have already been reduced by 53% and 57%, respectively. Thus, cost-effectiveness is determined to achieve the incremental reduction up to the 81% selected by EPA as RACT.

As shown above, alternate control technologies will not achieve the 81% control target. The remaining option for evaluation is conversion to waterbased coatings. Such coatings, were they to exist for use on Ford vinyl constructions, could exceed the 81% reduction level. An initial investment cost breakdown per printer is shown below for waterbased conversion.

Cost Breakdown to Convert Printer to Waterbased Coatings

Equipment	$199,000*
Capital Labor	162,000*
Expense Labor	54,000
Instrumentation	10,000*
Design	32,000*
License	125,000
R/D	168,000

* Capital cost items

These costs were annualized and cost-effectiveness values computed for incremental emission reductions up to 81%, and beyond for a waterbased coating containing a minimum of 10% solvent by volume.

Incremental Cost-Effectiveness of Waterbased Coatings

Basis	Coating Line	Incremental VOC Reduction (Tons/Year)	Cost-Effectiveness ($/Ton)
W/B-81%	7	72	8,897
W/B-81%	8	67	9,561
W/B*	7	94.5	6,783
W/B*	8	92	6,967

* Assumes 10% organic solvent

This analysis presumes all automotive vinyl products produced at Mt. Clemens can be converted to waterbased products, while maintaining stringent Ford quality specifications. We understand that other vinyl manufacturers may be making certain limited constructions (of unknown quality) such as headliners, and seating materials for use in areas not subject to extensive wear. Ford remains convinced that vinyls subject to exposure to weather and to abrasion will not be amenable to conversion. USEPA admits that waterbased coatings for dielectric sealable exterior material (vinyl roofs) are not available. (Letter, Steve Rothblatt, USEPA to Robert Miller, Sept. 12, 1984.) The same is true for similar materials used for interior door panels.

We conclude that: (1) waterbased vinyl coatings are not available (and not likely to become available) for across-the-board application to Ford automotive products, and (2) even if they were developed at some future date their application to Printer Nos. 7 and 8 is not economically reasonable.

Two other RACT-related issues are mentioned in the Staff Activity Report (p. 3)—expeditious compliance dates, and non-interference with the ozone attainment strategy (SIP). At present, Mt. Clemens Vinyl Plant provides 88% of total Ford automotive vinyl requirements. When it became apparent that, in spite of VOC emission reductions accomplished, neither the MDNR or the USEPA would accept a revised compliance program incorporating a bubble to allow all nine existing printers to operate, Ford immediately developed a shutdown schedule for the six uncontrolled printers. The timing of this plan must accommodate the outsourcing of lost production to avoid far-reaching economic effects to the Company's car and truck products. Three uncontrolled printers (Nos. 2, 3 and 9) have already been retired.

The outsourcing program considered was to increase the outside vinyl purchase to 56 percent on a total pur-

chase quantity of 15.7 million yards and complexity of 203 parts for the 1986 model year. Purchasing Staff projects that the complexity of this outsourcing action will require approximately six months to complete after sourcing is finalized.

After careful consideration of a wide range of factors including the type of vinyl construction involved, the shifting of production schedules to minimize job loss and vender quality verifications, a plan had been established for replacing this business by Canadian General Tower and Uniroyal (both outside of Michigan). Contracts were awarded to those suppliers on December 18, 1984.

The new suppliers have indicated that capital equipment will be required to support their new business but could expeditiously be procured within six months. In addition, they were not previously qualified to supply all of the required parts but felt that this could also be accomplished within six months. Ford Purchasing Staff has estimated, based on past experience, that this product qualification of source approval would take from 21 to 29 weeks.

Accordingly, the shutdown of two uncontrolled printers (Nos. 1 and 5) by June 30, 1985 is as "expeditiously as practicable." The remaining uncontrolled printer (No. 10) will cease operation as soon as possible after this date. The proposed Order provides for its operation until November 30, 1985 to ensure that quality standards are not compromised and that introduction timing for the Ford Motor Company 1986 model vehicles which are scheduled for launch throughout the third quarter of 1985 is not jeopardized.

The 1982 ozone SIP revision for the Detroit urban nonattainment area, scheduled to be formally submitted by the MDNR to EPA in early January 1985, originally allocated 1440 tons per year of VOC emissions to the

Plant through 1987. Actually, the VOC emissions from the vinyl plant will be reduced in accord with the proposed Order to 440 tons per year by the end of 1985. Therefore, the proposed Order will enhance (and not interfere with) the strategy for bringing the Detroit urban area into ozone attainment.

4. There will be a negative employment effect as a result of the equipment shutdown required by the revised Order. Company management and the United Auto Workers regret this consequence, but nonetheless we request the Commission's approval in order to avoid even greater job loss. The immediate effect of operating only three controlled printers (Nos. 7 and 8, and No. 11 which is not covered in the Order) is a net loss of 139 hourly-paid and 17 salaried headcount, or a total of 156 jobs. Every effort is being made to cover these losses by attrition (the Plant has not hired new employees since August 1984) and to reassign or relocate affected individuals.

If the Commission does not approve the revised Order, Printer Nos. 7 and 8 will also have to be shut down increasing the job loss to 364 (275 hourly and 89 salaried). The consequences of that action could be more far-reaching, because the economic viability of operating the Plant with only one remaining vinyl printer (No. 11) is questionable.

Appropriate representatives of the Company will be present at the public hearing scheduled for January 15, 1985, to answer any questions from the Commission. Approval of the staff's recommendation and proposed Consent Order is respectfully requested.

[UAW LOGO]

UNITED AUTOMOBILE • AEROSPACE •
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW)
INTERNATIONAL UNION

FORD LOCAL No. 400 UAW
50595 Mound Road
Utica, Michigan 48087

January 7, 1985

Michigan Air Pollution Control Commission
P.O. Box 30028
Lansing, MI 48909

Subject: Air Pollution Hearing January 15, 1985

We the Bargaining Committee of Local 400 of the United Auto Workers, which represents employees of Ford Motor Company's Mt. Clemens Vinyl Plant, strongly support the proposed action by the Clean Air Commission of the Department of Natural Resources.

The proposed consent order would allow the Vinyl Plant to continue operating "controlled" printers (Nos. 7 & 8) and yet still produce favorable results for the environment. Although the proposed action has an adverse effect on employment with a loss of up to 130 jobs, we believe if this consent order is not implemented there will be an *additional* loss of approximately 200 jobs. Also, if we cannot continue the vinyl operation, which is 75% of the plant's production output, we are sure that the Vinyl Plant could not in the long term remain open resulting in a total loss of 450 jobs.

We the Bargaining Committee believe the consent order worked out between Ford Motor Company and the State of Michigan's Department of Natural Resources will satisfy the environmental needs of the area and on be-

half of the Vinyl Plant's 450 hourly employees we implore this Commission to accept the consent order.

Sincerely,

/s/ James H. Purchase
JAMES PURCHASE
Chairman Local 400 UAW
Mt. Clemens Paint & Vinyl Plants

/s/ Richard McCleary
RICHARD MCCLEARY
Committeeman Vinyl Plant

/s/ Robert R. Catanzaro
ROBERT CATANZARO
Committeeman

/s/ Michael G. Bennett
MICHAEL BENNETT
Committeeman

Concur:

/s/ Frank Vesprini
FRANK VESPRINI
President
Local 400 UAW

/s/ Robert Tiseo
ROBERT TISEO
Vice President
Local 400 UAW

cc: Gov. J. Blanchard, S.P. Yokich,
B. Lent, G. Morris, P. Pestillo

fv/meg42

TRANSCRIPT OF PROCEEDINGS
Before the Michigan Air Pollution Control Commission
Lansing, Michigan—January 15, 1985

THE CHAIRMAN: The record will so note that Commissioner Partee is absent from this Commission during the discussion of agenda items #5 and #6.

Item #5—The Commission will again convene public hearing—this is on a public hearing for a proposed consent order to control volatile organic compound emissions from vinyl coating operations at the Mt. Clemens Vinyl Plant. Staff.

MR. BOB MILLER: Before beginning the introduction I would like to pass on the complaint the people in the back of the room have been having difficulty hearing so to recommend that everybody speaks—speaks directly into the microphone. Thank you.

To present the staff report on Ford Motor Company will be Mr. Tom Maki. Tom is the district supervisor from our Northville office and responsible for the Mt. Clemens among other areas around the Metro area of Detroit. Tom.

MR. TOM MAKI: Thanks Bob. The Ford Mt. Clemens Vinyl Plant produces and coats a wide variety of sheet vinyl fabrics used in automobile seats, headliners and other automotive applications with resulting volatile organic compound emissions from the plant's coating lines. This plant is the only one in Michigan subject to the vinyl coating limit to Rule 610. There is an existing Consent Order SIP No. 24-1982 for this plant which was approved by the Commission November 30, 1982 and became effective May 25, 1983. The consent order which is being proposed to the [2] Commission today would rescind and replace this consent order.

On January 27, 1984 the Company submitted a letter to staff which explained that the Company had revised their computer program which is used to calculate coat-

ing line emission rates. More accurate data on specific coating formulations and densities were now being used. As a result the calculated emission rates using more accurate data were greater than the emission rates calculated previously using composite coating characteristics. Unexpectedly, the new calculated emission rates were also in excess of some of the emission limits of Consent Order 24-1982. Staff has met with the Company on numerous occasions to renegotiate this consent order. On April 19, 1984 the U.S. E.P.A. issued a notice of violation to the Company for violation of Michigan Rule 610. On September 26, 1984 the U.S. Justice Department filed suit on the Company. In turn, the Company on October 16, 1984 filed suit in Ingham County Circuit Court against the Michigan Air Pollution Control Commission, the Michigan Natural Resources Commission, and the Michigan Department of Natural Resources petitioning the Court for injunctive relief from the enforcement of Rule 610 and to declare that Rule 610 is void and unenforceable with regard to the coating of vinyl. Staff has continued to meet with the Company and a new proposed consent order has been developed. The proposed order provides for a phased shutdown of the six uncontrolled printers with interim emission limits until shutdown. Use of printers two, three and nine would be discontinued with the effective date of the new order. Printers one and five would be phased out by June 30th of '85 [3] and the last uncontrolled printer, printer ten, would be removed from service by November 30th of '85. The proposed order also provides for a total emissions cap of 440 tons of VOC per year from all coating lines at the plant beginning January 1, 1986. In regards to printers seven and eight, the Company has conducted extensive work in testing to maximize efficiency of the solvent condensation systems in an unsuccessful attempt to meet the original emission limit. The RACT emission limits proposed for printers seven and eight in items 8b and 8c of your consent order reflect the actual capabilities of the condensation systems. It should be noted that

the emission limits in this order use a different basis than is used in the table in Rule 610. The basis or the limit in Rule 610 is 4.5 pounds of VOC per gallon of coating and the limits in this proposed order as in the existing order use the basis of pounds of VOC per gallon of coating solids. So the numbers appear higher than the 4.5 which is in the table but it should be remembered that it uses a different basis.

The proposed order also includes record-keeping and reporting requirements to demonstrate compliance with the terms of the order. There have been two public comments received, one from UAW—a letter dated January 7th which I believe is in your folder—supporting entry of the order. Also, comments were received from Ford—a letter dated January 8th—there were two specific comments on the wording of the order, both of which are supported by staff and they recommend changes on page four. The first line is to replace the words "by January 1, 1986" and to use the words "beginning January 1, 1986." And the [4] last line on page four was a correction of notation where the letters "cb" appear in your draft and it should read "cv."

THE CHAIRMAN: Where is it?

MR. TOM MAKI: The last line on page four. Way down at the bottom.

THE CHAIRMAN: Repeat that.

MR. TOM MAKI: The correction should read "Civil Action No. 84 CV—as in Charlie Victor.

THE CHAIRMAN: CV?

MR. TOM MAKI: CV as in Charlie Victor. Staff recommends entry of the proposed consent order which would rescind and replace Consent Order No. 24-1982. There are representatives of the Company here.

THE CHAIRMAN: Any questions of staff?

COMMISSIONER KACHMAN: Does this plant now object to interrupt existing operating conditions as proposed?

MR. TOM MAKI: I believe its something in the vicinity of 1,000 tons or more.

COMMISSIONER KACHMAN: And when they are through with it after '85?

MR. TOM MAKI: It would be 440 tons per year or less.

THE CHAIRMAN: Tom, could you explain why the change in the units from pounds per gallon of coating to now pounds per gallon of solids, I am totally unfamiliar with that—how do you determine compliance with that?

MR. TOM MAKI: There is a procedure for, an actual stack testing procedure, but the reason for it is that it's a more [5] understandable basis for—when there is control equipment on a process.

COMMISSIONER KACHMAN: It makes it easier for you to determine compliance with that as opposed to the other which was just pounds per gallon.

MR. TOM MAKI: Yes.

COMMISSIONER KACHMAN: Is that right? So the chance is really at staff's preference as opposed to the Company's preference, is that . . .

MR. TOM MAKI: It could be either way, but it's a more—I think it better exemplifies the magnitude in change in emissions. The emission limit which is in the Rule is a non-linear scale. Whereas the pounds of VOC per gallon of coating solids is a more linear relationship.

COMMISSIONER KACHMAN: Thank you.

THE CHAIRMAN: I have a card from a company representative—Joe Lennon. Joe, did you want to speak to this? And a Linda Gamble—not on that—not on the outline. Thanks.

MR. JOE LENNON: Mr. Chairman, commissioners, my name is Joseph Lennon. I am a facility environmental control engineer for Ford Motor Company. I have with me today on my right Dave Volta who is the plant manager at Ford Mt. Clemens' plant and to my left is Norman Bernstein an associate counsel at Ford. Additional Ford and UAW personnel are here with us today.

Ford Motor supports the entry of the proposed order. By letter dated January 8, 1985, Ford filed with the

Executive Secretary to the Commission comments both to support the proposed consent order and to amplify the staff's [6] activity report. Copies were also sent to the Commission members. We would like those comments to be deemed as Ford's testimony in this matter and we are here to answer any questions that you may have concerning the proposed commission action.

THE CHAIRMAN: Any questions of the Company?

COMMISSIONER MOORE: Not so much a question as a comment. I was very happy to receive Ford's comments and especially those by Mr. Sussman because it went a long way to remedy the deficiencies in the staff report and had I had to rely on the staff report I would have had to have abstained because there wasn't sufficient information upon which I could base any kind of intelligent vote. So, if I do vote for it, it's only because of your remedy of the staff report.

THE CHAIRMAN: Thank you. Well, Mr. Lennon, I assume from your comments that the Company has entered into an agreement with staff recommendations and the changes that were made to the proposed order here by staff at this time? Is that correct?

MR. JOE LENNON: That's correct.

THE CHAIRMAN: Other questions of the Company? Thank you very much, gentlemen.

MR. JOE LENNON: Thank you.

THE CHAIRMAN: Again, this is a public hearing and although I have no other cards indicating a desire to speak on this issue, if there are others present that would like to, you have an opportunity to do so at this time. Mr. Bernstein.

MR. NORMAN BERNSTEIN: Yes, I think we should add that Mr. Freeman and I have reached an agreement in principle to settle [7] the litigation between the State and Ford based on the entry of this order, and I think Mr. Freeman can confirm that.

THE CHAIRMAN: Mr. Freeman, would you like to comment on that at this time?

MR. STEWART FREEMAN: Well, I—I think—I think the language used is clear. I was in on the negotiations of the document. You'll notice particularly paragraphs six, seven and eight reflect a finding by this Commission that the existing rule is in effect unreasonable. That doesn't happen very often. But we have individually and collectively admonished your staff that if and when a hypothetical situation of a company that could show that the rule is unreasonable comes forward it should be dealt with honestly—that's what you've got before you—the settlement of the lawsuit is really fairly easy—and if this Commission adopts an order which says—well, we made a mistake in the promulgation of the rule and here's what we want to do instead—if you choose not to do that, we'll go back and defend the rule. The difficulty from my standpoint is that all of the people that I would look to as witnesses to defend your rule are people who are here recommending to you that the rule be changed. It's an interesting situation in that this rule in effect applies only to a few pieces of machinery in a single plant. But the precedent that the Commission when faced with it—a company which says your rules are unreasonable and staff agreeing—will then come in and in effect repeal the rule and change it. By it being an order, its precedent, others may wish to take advantage of same. I am not counseling you not to do it, as I say, I am one of the [8] authors of what is before you, but I don't want you to get excited when others come in and say—well, we want the same deal you gave Norm Bernstein at Ford. Maybe they'll be entitled to it. When you write thousands of rules, I think there is some risk that every once in a while you are going to have to admit that one of them could be fixed up a little bit—could be fixed a little better—there is the possibility that unfriendly reaction by the Environmental Protection Agency but somebody has to go first in this situation. It's your rule—the United States in effect is trying to enforce your rule in federal court which is why the Company came here and

said look we can't live with the rule. There will be those who said—there may be those who would suggest—that in so doing you're undercutting federal enforcement action. Let me anticipate the question and tell you my answer to that is perhaps the EPA should consult with us before they file an action in Michigan against the Company for enforcement of one of this Commission's rules when there is a dispute between the staff and the Company as to whether or not the rule is reasonable and enforceable in its present form. So, it's a classic compromise but an interesting precedent. I guess the question is whether you're persuaded. We deliberately drafted the language of key paragraphs so that the Commission would make a finding. That's mostly the lawyers on both sides talking there. We don't think Bob Miller should be going out saying—well, this rule is no good or that rule is no good. If the staff is going to retreat from a position in a promulgated rule and adopt instead a different regulatory posture as to a particular company, that's the kind of [9] thing that this Commission ought to do not the staff. We put it before you with the language that has you finding that you're satisfied with what's before you and if you're not then we better get the Company or staff up here with some more facts.

THE CHAIRMAN: Thank you. Questions of Mr. Freeman? Again, this is a public hearing. Is there any others present now that would like to speak to this issue? There being none, what's the pleasure of the Commission?

COMMISSIONER KACHMAN: I make a motion that we accept the staff's recommendation.

THE CHAIRMAN: So moved by Commissioner Kachman, support by Commissioner Sehaner. Is there discussion of the motion? Is the motion clear? Then we'll call the roll.

Commissioner Greenberg.

COMMISSIONER GREENBERG. Yes.

THE CHAIRMAN: Commissioner Kachman.
COMMISSIONER KACHMAN: Yes.
THE CHAIRMAN: Commissioner McMahon.
COMMISSIONER MCMAHON: Yes.
THE CHAIRMAN: Commissioner Moore.
COMMISSIONER MOORE: Yes.
THE CHAIRMAN: Commissioner Partee. Commissioner Partee abstains. Commissioner Sehaner.
COMMISSIONER SEHANER: Yes.
THE CHAIRMAN: Commissioner Skoog.
COMMISSIONER SKOOG: Yes.
THE CHAIRMAN: The chair votes yes. Thank you.

APPENDIX G

RELEVANT PROVISIONS OF THE CLEAN AIR ACT

Section 109(a), 42 U.S.C. § 7409(a), provides:

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

Section 110(a), 42 U.S.C. § 7410(a), provides in relevant part:

> § 7410. State implementation plans for national primary and secondary ambient air quality standards
>
> (a) Adoption of plan by State: submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems
>
> (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.
>
> (2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained,

and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 7603 of this title, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 7428 of this title:

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standards; or (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D (relating to nonattainment areas);

(J) it meets the requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), part C (relating to prevention of significant deterioration of air quality and visibility protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after August 7, 1977, the reasonable costs (incurred after such date) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action).

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

Section 172(a)-(b), 42 U.S.C. § 7502(a)-(b), provides:

§ 7502. Nonattainment plan provisions

(a) Expeditious attainment of national ambient air quality standards

(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 7410(a)(2)(I) of this title as a precondition for the construction or modification of any

major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) Requisite provisions of plan

The plan provisions required by subsection (a) of this section shall—

(1) be adopted by the State (or promulgated by the Administrator under section 7410(c) of this title) after reasonable notice and public hearing;

(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable;

(3) require, in the interim, reasonable further progress (as defined in section 7501(1) of this title) including such reduction in emissions from existing sources in the area as may be

obtained through the adoption, at a minimum, of reasonably available control technology;

(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under subsection (a) of this section;

(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area;

(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 7503 of this title (relating to permit requirements);

(7) identify and commit the financial and manpower resources necessary to carry out the plan provisions required by this subsection;

(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section;

(9) evidence public, local government, and State legislative involvement and consultation in accordance with section 7504 of this title (relating to planning procedures) and include (A) an identification and analysis of the air quality, health, welfare, economic, energy, and social effects of the plan provisions required by this

subsection and of the alternatives considered by the State, and (B) a summary of the public comment on such analysis;

(10) include written evidence that the State, the general purpose local government or governments, or a regional agency designated by general purpose local governments for such purpose, have adopted by statute, regulation, ordinance, or other legally enforceable document, the necessary requirements and schedules and timetables for compliance, and are committed to implement and enforce the appropriate elements of the plan;

(11) in the case of plans which make a demonstration pursuant to paragraph (2) of subsection (a) of this section—

(A) establish a program which requires, prior to issuance of any permit for construction or modification of a major emitting facility, an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification;

(B) establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program; and

(C) identify other measures necessary to provide for attainment of the applicable national ambient air quality standard not later than December 31, 1987.

APPENDIX H

RULE 28.1 STATEMENT

The following is a listing of subsidiaries (except wholly owned subsidiaries) and affiliates of petitioner Ford Motor Company:

Subsidiaries:

Anhanguera Leasing S.A.—Arrendamento Mercantil
Bongotti S.A. Industria e Comercio de Radiadores
Consorcio Nacional Ford Ltda.
Distribuidora Ford de Titulos e Valores Mobiliarios Ltda.
Eik & Hausken A/S
Escorts Tractors Limited
Eveleth Taconite Company
Excel Industries
1st Nationwide Network, Inc.
Ford Administracao e Consorcios Ltda.
Ford Brasil S.A.
Ford Credit A.B.
Ford Credit A/S
Ford Credit B.V.
Ford Credit Bank Aktiengesellschaft
Ford Credit N.V.
Ford Credit S.A.
Ford Distribuidora de Produtos de Petroleo Ltda.
Ford Financiadora S.A. Credito, Financiamento e Inv.
Ford Investitions-GmbH
Ford Investitions GmbH & Co. oHG
Ford Lio Ho Motor Company Ltd.
Ford Motor Company Aktiebolag
Ford Motor Company A/S
Ford Motor Company (Austria) K.G.
Ford Motor Company (Belgium) N.V.
Ford Motor Company of Australia Limited
Ford Motor Company of Canada, Limited

Ford Motor Company of New Zealand Limited
Ford Motor Company Private Limited
Ford Motor Company (Switzerland) S.A.
Ford Motor Credit Company of New Zealand Limited
Ford Motor Norge A/S
Ford Nederlands N.V.
Ford Overseas Finance N.V.
Ford Sales Company of Australia Limited
Ford Versicherungs-Vermittlungs GmbH
Ford Versorgungs und Unterstutzungseinrichtung GmbH
Ford-Werke Aktiengesellschaft
Fords Vagnskadegaranti A.B.
Hokkai Ford Tractor Co., Ltd.
Humboldt Mining Company
Oy Ford Ab
Quimica Parker, S.A. de C.V.
Saar-Industrie GmbH
Sao Francisco Maquinas e Ferramentas Ltda.

Affiliates:

Agromak, S.A. de C.V. (FTA)
Allied Tractor Limited
American Network, Inc.
Amim Holdings Sdn. Bld.
Assembly Plant Material Services, Inc.
Canapro S.A.R.L.
Carnegie Group Inc.
Carplastic, S.A.
Ceradyne Advanced Products, Inc.
Compania Financiera de Inversones y Credito S.A.
Conix Corporation
Double Eagle Steel Coating Company
Essex Manufacturing
Fabrica de Tractores Agricolas S.A.
Fairlane Woods Associates
FCP Finance Corporation
Foral Services Proprietary Ltd.

Ford Credit South Africa (Proprietary) Ltd.
Ford Vehicle Finance
General Electric Credit Auto Resale Service, Inc.
Halla Climate Control Corp.
Implementos Agricolas Mexicanos, S.A.
Iveco Ford Truck Limited
Kia
Mazda Motor Corporation
Metro Investment Service Corporation
Nascote Industries, Inc.
Nemak, S.A.
New Holland Japan Inc.
New River Casting Company
Otomobil Sanayii, A.S. (Otosan)
Oy - Ford Rahoitus Ab
Renaissance Center Partnership
Renaissance Center Venture
South African Motor Corporation (Proprietary) Limited
Sukat Real Estate Holdings
Synthetic Vision Systems, Inc.
TG Ford Associates
Trans Canada Glass Ltd.
Thace
Vitro Flex, S.A.

Supreme Court, U.S.
FILED
AUG 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1892

In the Supreme Court of the United States

OCTOBER TERM, 1987

FORD MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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25 pp

QUESTION PRESENTED

Whether petitioner is immune from federal enforcement of an EPA-approved Clean Air Act State Implementation Plan (SIP) on account of a state court's entry of a consent judgment, negotiated between petitioner and state authorities, that purports to vacate the relevant portion of the SIP.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 814 F.2d 1099. The ruling of the district court (Pet. App. 10a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-19a) was entered on March 27, 1987. The petition for a writ of certiorari was filed on May 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Clean Air Act (CAA), 42 U.S.C. (& Supp. III) 7401 *et seq.*, establishes a comprehensive federal program to protect and enhance the quality of the nation's air resources. Section 109 requires the Environmental Protection Agency (EPA) to promulgate national ambient air quality standards (42 U.S.C. 7409) and Section 110 then requires each state to adopt and submit for EPA approval a State Implementation Plan (SIP) to achieve the federal air quality standards within the state's borders (42 U.S.C. 7410). The SIP will generally contain detailed regulations limiting emissions from air pollution sources, including timetables for compliance. See *ibid.* Once the SIP is approved, both the federal and state governments may enforce its provisions. See CAA § 113, 42 U.S.C. 7413.

1. In February 1979, EPA promulgated a combined primary and secondary national ambient air quality standard for ozone. See 44 Fed. Reg. 8202 (1979); 40 C.F.R. 50.9.[1] Shortly thereafter, Michigan promulgated a SIP, known as Rule 610, governing the release of air pollutants that contribute to ozone formation. Mich. Admin. Code 336.1610 (1979). Among its provisions, Rule 610 limits emissions of volatile organic compounds from vinyl coat-

---

[1] Ozone, a by-product of the photo-chemical oxidation of volatile organic compounds (such as solvents), is a respiratory irritant that is linked to various health disorders. 44 Fed. Reg. 8203-8204 (1979). See generally *American Petroleum Institute* v. *Costle*, 665 F.2d 1176 (D.C. Cir.), cert. denied, 455 U.S. 1034 (1981) (upholding EPA's ozone standard).

ing production lines.[2] Rule 610's limitation for each vinyl coating line is directly applicable to petitioner Ford Motor Company's Mount Clemens manufacturing plant, the only vinyl coating facility in the state. This plant is located in a "nonattainment area"—an area in which the ozone level already exceeds the national ambient air quality standard. It is therefore subject to additional Clean Air Act requirements, including a requirement that the plant use, at a minimum, "reasonably available control technology" (RACT) to control its emissions. See CAA § 172(b)(3), 42 U.S.C. 7502(b)(3). Rule 610 was formulated to satisfy that requirement.

Michigan submitted Rule 610 to EPA, and petitioner urged approval, providing technical data in support of its recommendation. See C.A. App. 86-87 (letter from petitioner to EPA). EPA approved Rule 610 on May 6, 1980, specifically noting petitioner's support for the vinyl coating emission limitation. 45 Fed. Reg. 29790, 29799 (1980).[3] Rule 610,

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[2] Rule 610 provides in pertinent part (C.A. App. 74):

> (3) It is unlawful for a person to cause or allow the emission of volatile organic compounds from the coating of * * * vinyl, * * * from any existing coating line, in excess of the equivalent emission rates as shown in table 63.

Table 63 states that the allowable emission rate for the coating of vinyl is 4.5 pounds of volatile organic compounds (minus water) per gallon as applied.

[3] EPA stated (45 Fed. Reg. 29799 (1980)):

> USEPA believes that the technical support submitted by the State and Ford Motor Company adequately documents that an emission limitation of 4.5 lbs/gallon represents

which required compliance by December 31, 1982, thus became part of the federally-enforceable Michigan SIP. See 45 Fed. Reg. 29801-29802 (1980); 40 C.F.R. 52.1172.

On April 19, 1984, EPA determined that petitioner was operating eight vinyl coating lines at the Mount Clemens facility in violation of Rule 610 and issued a Notice of Violation ordering petitioner to comply (C.A. App. 9-10). Petitioner continued to violate Rule 610's requirements. Accordingly, on September 26, 1984, the United States filed this action under Section 113(b) of the Clean Air Act, 42 U.S.C. 7413(b), seeking injunctive relief and civil penalties with respect to the eight lines (C.A. App. 5-19). See 42 U.S.C. 7502(e).[4] The complaint alleged that six of the eight lines were operating without any pollution control equipment and were emitting pollutants at rates in excess of those allowed by Rule 610 (C.A. App. 7, 10-13, 15-17). The complaint further alleged that while petitioner had installed control equipment on the other two lines, emissions from those lines also exceeded the rates prescribed by Rule 610 (*id.* at 13-15).[5]

RACT [reasonably available control technology] for this vinyl coating plant.

EPA also observed that Michigan's Rule 610 is not as stringent as limitations recommended by EPA and placed on vinyl coaters in other states (*ibid.*).

[4] Petitioner contends that EPA did not notify or consult with Michigan before filing the enforcement action (Pet. 7, 20 n.6). In fact, EPA sent a copy of the April 19, 1984 Notice of Violation to the Michigan Department of Natural Resources, pursuant to Section 113(a)(2) of the Clean Air Act, 42 U.S.C. 7413(a)(2). See C.A. App. 10.

[5] Petitioner admits that it has violated Rule 610's emission limitations, but claims that its behavior is consistent with the

2. One month later, petitioner filed suit in Michigan state court against the Michigan Department of Natural Resources, the Michigan Air Pollution Control Commission, and the Michigan Natural Resources Commission. Petitioner sought to enjoin those state defendants from enforcing Rule 610 on the ground, among others, that the emission limits are technologically and economically infeasible. EPA was not a party to the action nor was it notified of the filing of the action.

The Michigan Department of Natural Resources agreed that Rule 610's emission limitations should be revised.[6] In early 1985, the Michigan Air Pollution Control Commission approved a "Stipulation for Entry Consent Order and Final Order" (Pet. App. 26a-31a) stating that "the Commission finds that for [vinyl] coaters 7 and 8 [the lines on which equipment had been installed], the Vinyl Limit [set forth in Rule 610] was (and is) not achievable

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"goal" of those emission limitions. See Pet. 8 (stating that "Ford subsequently met or exceeded the goal for reducing *total* VOC emissions that formed the basis for the *rate* limitation in Rule 610" but was "unable to meet the emissions *rate* limitation of Rule 610" (emphasis in original)); see also *id.* at 7-9, 21 n.7. Indeed, petitioner could hardly contend to be in compliance: it installed no pollution abatement equipment on six of the lines and claims that Rule 610's emission limitations are, in any event, infeasible.

[6] The Department's Air Quality Division prepared a report stating that Rule 610, when enacted, was believed to constitute reasonably available control technology (RACT) (Pet. App. 34a). It also stated, "Because the proposed Order reflects limits that are different than those in the currently approved Michigan SIP, the order must be submitted to EPA as a revision to the SIP. Such 'site-specific' SIP revisions * * * must meet certain criteria in order to be approvable" (*id.* at 36a).

through the use of reasonably available control technology" (*id.* at 27a-28a). The Commission's order provided for a phased shutdown of the six uncontrolled lines and set a more lenient standard for the two controlled lines than that provided in Rule 610. The parties agreed that the order and all necessary data "shall be transmitted to the U.S. Environmental Protection Agency for approval as a revision to the Michigan State Implementation Plan" (Pet. App. 30a). On March 6, 1985, the Michigan Department of Natural Resources submitted the order to EPA for approval as a SIP revision pursuant to Section 110(a)(3) of the Clean Air Act, 42 U.S.C. 7410 (a)(3). See C.A. App. 89.

Petitioner and the state defendants then requested the state court to enter a final judgment and stipulation in accordance with documents submitted by the parties. The state court granted that request on March 18, 1985. See Pet. App. 22a-25a. The judgment, which was drafted by petitioner and the state defendants, states that Rule 610 "is hereby vacated and modified, with regard to the Ford Motor Company Mt. Clemens Vinyl Plant, to define reasonably available control technology, after December 31, 1982, as the emission control program set forth in the 'Stipulation for Entry of Consent Order and Final Order' of the Michigan Air Pollution Control Commission" (*id.* at 23a).

Next, petitioner filed a motion for summary judgment in the instant action, contending that the federal government could not enforce Rule 610 because the state court had invalidated the rule insofar as it applied to petitioner. The district court orally granted the motion on August 5, 1985, and entered

a judgment dismissing the government's claim on August 14, 1985 (Pet. App. 10a, 14a).[7]

3. The court of appeals reversed and remanded the case to the district court to permit the federal enforcement action to proceed (Pet. App. 1a-9a). The court rejected petitioner's contention "that the state court consent judgment is controlling" (*id.* at 3a) and precludes a federal enforcement action. It held that the state court judgment could not preclude federal enforcement of the federally-approved SIP because the Clean Air Act requires that "the original emission limit remains fully enforceable until a revision or variance is approved by both the State and EPA" (*id.* at 7a).

The court distinguished the Seventh Circuit's decision in *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (1983), on which petitioner relied. There, the Seventh Circuit invalidated an Indiana SIP that had not been properly promulgated under state procedural law. The court observed that here, Rule 610 had been properly adopted and only later repudiated by the state "through the discovery of subsequent technical data" (Pet. App. 6a). The court of appeals further stated that petitioner's collateral estoppel claim—based on the Michigan state court's entry of a consent judgment in which the United States was not a party—"borders on the frivolous" (*ibid.*) and that petitioner has no

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[7] The government subsequently filed a motion for reconsideration, which the district court denied (Pet. App. 16a). The district court added that the state court judgment vacated Rule 610 for all lines at the Mount Clemens facility, not just lines 7 and 8, the lines specifically referred to in the state court judgment (*id.* at 17a).

viable claim here that any due process right has been violated (*id.* at 7a-9a).

ARGUMENT

The Michigan Air Pollution Control Commission, with petitioner's support, adopted and submitted for EPA approval SIP regulations limiting pollutant emissions from petitioner's plant. EPA approved those regulations and has since sued petitioner for noncompliance. The state agency, at petitioner's urging, has now concluded that the emission limitations are more demanding than it originally intended. It has elected to revise the limitations and has submitted the revisions for EPA approval. The court of appeals correctly concluded that petitioner remains subject to a federal action for enforcement of the existing regulations unless and until EPA approves the proposed revisions in accordance with statutorily prescribed procedures. That decision does not conflict with any decision of this Court or of any other court of appeals, and does not merit further review.

1. The 1970 amendments to the Clean Air Act "place the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject the States to strict minimum compliance requirements." *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256-257 (1976).[8] "These requirements

[8] See 42 U.S.C. 7410(a)(2), 7502. The 1970 amendments were designed to "tak[e] a stick to the States" and "sharply increased federal authority and responsibility in the continuing effort to combat air pollution." *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 64 (1975). As the court of appeals recognized (Pet. App. 5a), Congress saw a need for minimum federal standards because relaxed requirements in one state could adversely affect air quality in other states.

are of a 'technology-forcing character'" (*id.* at 257 (citation omitted)) and "are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible" (*ibid.*). A state may, of course, impose even stricter limitations than the Act requires (*id.* at 265). But if a state fails to adopt a SIP that meets the Act's minimum requirements, EPA may promulgate its own SIP for that state. CAA § 110(c), 42 U.S.C. 7410(c).[9]

Congress recognized that under this scheme, states might wish to change their SIP requirements in light of changing conditions and enhanced understanding of the complex science and technology of air pollution control. See *Union Electric Co.*, 427 U.S. at 266. Congress therefore provided a SIP revision process, under Section 110(a)(3) of the Act, that allows alteration of previously approved SIP provisions provided that the revised SIP continues to satisfy the Act's minimum requirements (42 U.S.C. 7410(a)(3)). Congress further specified that except for a plan revision under Section 110(a)(3) (and certain other exceptions not relevant here):

> no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator [of EPA].

CAA § 110(i), 42 U.S.C. 7410(i). Thus, Congress stated, in terms that could not be clearer, that a pro-

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[9] Congress, through the 1977 Clean Air Act Amendments, imposed even stricter minimum requirements by placing RACT limitations on non-attainment areas. CAA § 172(b)(3), 42 U.S.C. 7502(b)(3).

posed SIP revision must obtain EPA approval under Section 110(a)(3) to become effective. EPA has consistently emphasized that requirement in the applicable regulations.[10]

This Court has expressly recognized that an EPA-approved SIP remains in effect pending federal approval of a state's proposed revision. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 92 (1975). The Court has stated (*ibid.* (footnote omitted)):

> [A] polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the [Environmental Protection] Agency. Should either entity determine that granting the variance would prevent attainment or maintenance of national air standards, the polluter is presumably within his rights in seeking judicial review. This litigation, however, is carried out on the polluter's time, not the public's, for during its pendency the original regulations remain in effect, and the polluter's failure

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[10] EPA's regulations specifically prohibit the states from unilaterally revising federally-approved SIP provisions:

> The Administrator shall approve any plan, or portion thereof, or any revision of such plan, or portion thereof, if he determines that it meets the requirements of the Act. Revisions of a plan, or any portion thereof, shall not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.

40 C.F.R. 51.8. The SIP revision process also is the proper mechanism by which states may obtain requisite EPA approval for variances applicable to specific polluters. *Train*, 421 U.S. at 70, 86-94.

> to comply may subject him to a variety of enforcement procedures.

The courts of appeals have, in turn, uniformly recognized and applied these principles.[11]

2. Petitioner argues that these principles should not apply here because petitioner negotiated a consent judgment with local authorities stating that Rule 610's emission limitations are "vacated and modified" (Pet. App. 23a). This consent judgment, in petitioner's view, renders Rule 610's emission limitations "invalid as of their inception" (Pet. 15). Petitioner contends that this result must obtain because the local authorities and petitioner "labored from the very outset under a mistake of fact" that the limitations would constitute reasonably available control technology (*id.* at 19-20).

Petitioner's argument is fundamentally inconsistent with the Clean Air Act's language, EPA's regulations, and the numerous judicial decisions cited above. As we have explained, Congress intended that the Clean Air Act would " 'tak[e] a stick to the States' " (*Union Electric Co.*, 427 U.S. at 249 (quoting *Train*, 421 U.S. at 64)) by requiring them to formulate pollution control strategies that "force

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[11] See, *e.g.*, *United States* v. *Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1084-1086 (3d Cir. 1987); *American Cyanamid Co.* v. *EPA*, 810 F.2d 493, 495 (5th Cir. 1987); *Duquesne Light Co.* v. *EPA*, 698 F.2d 456, 470-471 (D.C. Cir. 1983); *Ohio Environmental Council* v. *United States District Court*, 565 F.2d 393, 398 (6th Cir. 1977); *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 511 F.2d 809, 812 (D.C. Cir. 1975); *Natural Resources Defense Council, Inc.* v. *EPA*, 507 F.2d 905, 915 (9th Cir. 1974); *Natural Resources Defense Council, Inc.* v. *EPA*, 478 F.2d 875, 886 (1st Cir. 1973).

regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible" (427 U.S. at 257). Congress fully understood that the resulting SIP requirements would rest on complex scientific and technological projections and might occasionally reflect mistaken assumptions. Congress therefore provided a revision process and further specified that revisions shall not be effective "until they have been approved by *both* the State and the Agency." *Train*, 421 U.S. at 92 (emphasis added). See CAA § 110(a)(3), 42 U.S.C. 7410(a)(3); CAA § 110(i), 42 U.S.C. 7410 (i). Thus the Act, while involving the states in its implementation, carefully preserves a federal role to ensure accomplishment of its purposes notwithstanding any possible inclination of state authorities to give unduly favorable treatment to local industries.

Petitioner, at bottom, argues for a radical amendment of the Clean Air Act that would undermine the basic integrity of the SIP program. The Clean Air Act's elaborate technology forcing provisions and detailed procedures and timetables for SIP submission and approval would lose all practical meaning if a polluter and the state authorities could unilaterally rescind an EPA-approved SIP by simply agreeing that they have made a "mistake of fact" (Pet. 19). Likewise, EPA's authority to review and approve proposed SIP revisions would be eviscerated if any polluter that encountered difficulty in meeting a SIP requirement could invalidate that requirement by simply convincing state authorities that the emission limitation rests upon a "mistaken assumption" (*id.* at 19-20). Indeed, Congres created the SIP revision process for the specific purpose of allowing *both* EPA

and the state authorities to consider technical reassessments of SIP provisions.[12]

Petitioner's argument is not only inconsistent with the Clean Air Act, it is inconsistent with the terms of the agreement that petitioner concluded with the state authorities. Petitioner and the state authorities specifically agreed that the resulting agreement "shall be transmitted to the U.S. Environmental Protection Agency for approval as a revision to the Michigan State Implementation Plan" (Pet. App. 30a). The supporting technical document, prepared by the Michigan Department of Natural Resources, likewise stated that the agreement "must be submitted to EPA as a revision to the SIP" (*id.* at 36a) and that the revision "must meet certain criteria in order to be approvable" (*ibid.*). Thus, petitioner and the state authorities fully understood that their

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[12] Petitioner mistakenly cites *Union Electric Co.* for the proposition that "economic and technological infeasibility is not a proper issue either for EPA or the federal courts" (Pet. 13). Petitioner's characterization of that decision is plainly overbroad. The *Union Electric Co.* decision upheld EPA's position that Congress gave the agency no power to reject a proposed SIP on the ground, proffered by pollution sources, that the state proposal is so strict as to be economically or technologically infeasible (427 U.S. at 256). The decision does not limit EPA's authority to assure that SIP revisions meet the Act's minimum requirements. EPA may examine the technical support for Michigan's newly proposed emission rates—including the evidence supporting Michigan's claim that the present EPA-approved emission rates are infeasible—to assure that the proposed emission limitations meet the Act's RACT requirements. See CAA § 110(a)(2), 42 U.S.C. 7410(a)(2); see also CAA § 172, 42 U.S.C. 7502. Indeed, EPA conducted that type of technical assessment seven years ago when it approved the present RACT-based emission limitations in the original SIP proceedings. See 45 Fed. Reg. 29799 (1980).

agreement constituted a SIP revision subject to the Clean Air Act's revision approval process.

Petitioner suggests (Pet. 16) that this case is distinguishable from a standard SIP revision because petitioner obtained a state court consent judgment that "vacated" Rule 610's emission limitations (Pet. App. 23a). Petitioner itself composed the consent judgment's language and simply submitted it for the court's approval (see *id.* at 22a). Against this background, petitioner's assertion that the state court "[d]etermined" (Pet. 15) or "declared" (*id.* at 17) that Rule 610 was void *ab initio* is especially unpersuasive. There is no reason to believe that the state court intended to prohibit the federal government from enforcing the existing limitations. EPA was not a party to this suit, the state court did not purport to rule that it could issue a judgment binding EPA, and nothing in the judgment or the supporting documents indicates that the parties expected to preclude federal enforcement of Rule 610. Quite to the contrary, the consent judgment was plainly designed to settle a controversy between petitioner and the state authorities (Pet. App. 23a). The judgment simply prohibits the *state* defendants from enforcing Rule 610's emission limitations. See *Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, No. 84-1999 (July 2, 1986).

Petitioner's citation of comity principles (Pet. 23-24) is accordingly misplaced. The court of appeals' judgment does not interfere with the state court's limitation on state enforcement of Rule 610.[13] Nor is

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[13] In any event, the Clean Air Act's express provision for a SIP revision process overrides principles of comity. It is, of course, well established that comity gives way where the legislature has indicated to its courts the controlling rule. *E.g.*, *Walworth* v. *Harris*, 129 U.S. 355, 366 (1889). Peti-

petitioner correct in contending that the court of appeals' judgment results in "gross inequities" (*id.* at 24-26, see also *id.* at 16, 21). It is not "Kafkaesque" (*id.* at 16), "outrageous" (*id.* at 21) or a "Catch 22" to require petitioner to comply with existing emission limitations while EPA reviews the proposed revisions. See *Train*, 421 U.S. at 92. That is particularly true here, where *petitioner itself* recommended that EPA approve the existing regulations and provided technical support for that recommendation (see page 3 & note 3, *supra*).[14] Petitioner's contention

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tioner's citation of comity principles is, in fact, rather ironic. Comity is a two-way street; federal and state courts are expected to accord each other *mutual* respect. Comity would therefore caution a state court against entering a judgment precluding federal enforcement of a federal statute in federal court—particularly when the state court action involves only non-federal parties. The state court's judgment in this case should not be extrapolated to reach such an untoward result.

[14] Petitioner's contention that "EPA has simply sat on its hands, acting neither to approve the proposed revision nor to disapprove it" (Pet. 12) is inaccurate. The Clean Air Act charges EPA with responsibility "to protect and enhance the quality of the Nation's air resources" (CAA § 101, 42 U.S.C. 7401), and EPA therefore gives careful scrutiny to any proposal recommending relaxation of existing SIP requirements. And, as petitioner knows, EPA has conducted a continuing dialogue with state authorities and petitioner concerning the technical aspects of the proposal here to ascertain whether it will satisfy the Clean Air Act's minimum requirements. EPA expects to complete its action on a proposal to approve or disapprove Michigan's revision by November 1987, which will then be reviewed by the Office of Management and Budget. Thus, EPA is moving expeditiously in light of the important public rights involved. On the other hand, petitioner's own behavior has not been exemplary. Petitioner operated six of its eight vinyl coating lines, with no

that the court of appeals' decision denies petitioner due process (Pet. 26-28) is likewise meritless. The court of appeals did not "deny[] any meaningful effect to the judgment of the state court" (*id.* at 26); instead, the court of appeals correctly recognized that the state court judgment "has effected the first step in the revision process: the proposal of a revision to EPA by the state" (Pet. App. 8a). Due process does not require a federal court to treat the "first step" of a statutory revision process as a conclusive invalidation of an existing regulation.[15]

In short, Michigan's federally-approved SIP remains in effect—and federally enforceable—unless and until EPA approves the state's proposed revision. The court of appeals correctly rejected petitioner's contrary contentions.

3. In contending (Pet. 16-19) that the court of appeals' decision conflicts with *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (1983), petitioner characterizes *Sierra Club* as broadly holding that an SIP is rendered unenforceable whenever a litigant successfully challenges the SIP in state court. The *Sierra Club* decision is, in fact,

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pollution controls whatsoever, for *two-and one-half years* beyond the legally-binding compliance deadline (Pet. App. 33a).

[15] Petitioner may comment on the EPA's proposed action and may seek judicial review if EPA disapproves the revision. See CAA § 307, 42 U.S.C. 7607. Furthermore, as the court of appeals noted (Pet. App. 9a), petitioner's claims of infeasibility, if substantiated, may be considered as a mitigating factor in the imposition of penalties in the present enforcement action. Petitioner, moreover, has not sought in any court proceeding to require EPA to conclude more promptly its consideration of the proposed revision.

much narrower. The court of appeals correctly found that decision to be "readily distinguishable" (Pet. App. 6a n.1) from the case here.

In *Sierra Club*, a private organization brought suit in federal court to enforce an EPA-approved provision of the Indiana SIP. The federal court recognized that, prior to the citizen suit, an Indiana court had determined that the Indiana air pollution authorities had failed to comply with state procedural law when promulgating the SIP. 716 F.2d at 1147. The court held that the SIP was therefore unenforceable, reasoning that EPA approval of the SIP could not cure the procedural defect (716 F.2d at 1148).

As the court of appeals recognized (Pet. App. 6a), the *Sierra Club* decision is plainly limited to its special facts. The decision repeatedly emphasizes that the Indiana SIP was unenforceable because it was *procedurally* defective.[16] Indeed, the Seventh Circuit stated:

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[16] Petitioner specifically relies on a single sentence in *Sierra Club* for the proposition that the decision bars enforcement of the SIP in the event of *any* successful state court challenge (Pet. 6). The full passage in which that sentence is used shows, however, that the court was addressing only procedural challenges:

> Our examination of the statute, relevant judicial precedent, and the legislative history reveals that the Act does permit a successful state court challenge to render an implementation plan provision unenforceable in both federal and state court.
>
> Three reasons support this conclusion. *First*, administrative action, to be valid, must substantially comply with applicable procedural rules. Because APC-13 was not promulgated in accordance with Indiana procedural law, APC-13 is invalid and may not be enforced. *Second*, decisions construing the Act have encouraged litigants to

> Once a plan is adopted by the states and it *withstands any subsequent procedural challenge*, then § 7607(b)(1) provides that invalidation may occur only in the federal appellate courts.

716 F.2d at 1152 (emphasis in original). Thus, the *Sierra Club* decision, by its own terms, does not conflict with the court of appeals' decision in the present case.[17]

Petitioner concedes that the state court here did not find Rule 610 procedurally defective; instead, petitioner characterizes the state court judgment as confirming that Rule 610 possessed a "fundamental *substantive* defect under state law" (Pet. 17 (emphasis in original)). But even that characterization is overstated. As we have explained, the state court judgment simply ratified an agreement between petitioner and the state authorities providing that an

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> pursue their procedural challenges to state implementation plans in the state courts. For that review to be meaningful, a state court ruling, like that of the Indiana Appellate Court, must be given effect. *Finally*, no precedent exists to support the Sierra Club's novel suggestion that an invalid plan should be given effect until a replacement is devised; instead the Act and its Legislative history foresaw EPA action as the appropriate remedy for any state level failure.

716 F.2d at 1148 (emphasis in original).

[17] Petitioner's citations to *New Mexico Environmental Improvement Division* v. *Thomas*, 789 F.2d 825 (10th Cir. 1986), and *Illinois* v. *Celotex Corp.*, 516 F. Supp. 716 (C.D. Ill. 1981), are also misplaced. In the former case, the Tenth Circuit held that EPA could impose sanctions upon a state for failure to submit a SIP that complied with state law. In the latter case, the district court, as in *Sierra Club*, invalidated a SIP that was improperly promulgated under state procedural law.

EPA-approved emission limitation, validly promulgated under Michigan law, should be revised and submitted to EPA for approval. Petitioner points to nothing in Michigan substantive law that forbade the state pollution control authorities from imposing the original emission limitations prescribed by Rule 610. Nor did the state court find that action to have been ultra vires.

At bottom, petitioner can assert only that the state authorities, in attempting to satisfy the Clean Air Act's minimum requirements, actually imposed somewhat stricter standards.[18] EPA may or may not agree with that conclusion, depending on the results of its own ongoing technical assessment. But whatever the outcome of that assessment, there is certainly no merit to petitioner's statement that a "SIP provision promulgated in the mistaken assumption that it represented RACT means that there never was a federally-enforceable SIP provision applicable to Ford's Mount Clemens plant" (Pet. 19-20). Michigan's EPA-approved SIP remains in effect until changed in accordance with the Clean Air Act's SIP revision process. Petitioner simply seeks license to circumnavigate the statutory scheme.

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[18] Petitioner concedes that Rule 610, when promulgated by the state at petitioner's urging, "was believed to be economically and technically feasible based upon the data then available" (Pet. 9) and that the state authorities reached a different conclusion only "[u]pon reevaluation" (*ibid.*) by the state authorities following Ford's state court suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1987

FORD MOTOR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Brief in Opposition offers no answer to the legal arguments set forth in the Petition, in which we showed that the court of appeals' decision deprives companies such as Ford of *any* opportunity, in *any* court, to obtain a binding determination of the validity of a state SIP and that this inequitable result conflicts with the decisions of other circuits. Instead, the Opposition presents a melange of erroneous characterizations of the record (see App. 1, *infra*, 1a-3a), incorrect assertions about the impact of our position on Clean Air Act enforcement, and unseemly and unsupported suggestions of "collusion" between Ford and Michigan state environmental officials. EPA's effort to obscure the fundamental issues of federalism and due process presented by the Petition should not be permitted to succeed.

1. The Conflict In The Circuits. EPA is unable to offer any tenable distinction between the decision below and that of the Seventh Circuit in *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (1983). The Agency therefore is forced merely to parrot the Sixth Circuit's assertion that *Sierra Club* should be limited to state SIPs invalidated on state *procedural* grounds. See Br. in Opp. 16-18. But EPA fails to explain why there is any conceivable logic to the procedural-substantive distinction, nor does it offer any rationale for treating procedural flaws as having greater significance than substantive flaws. See Pet. 17-18. There is, of course, no such reason. As we explained in the Petition (at 16-20), the common denominator in *Sierra Club* and this case is that both SIPs were held by state courts to have been fundamentally flawed from their inception. It is that fact that places the two decisions in conflict, thereby necessitating an authoritative resolution by this Court.

2. The Deprivation Of Judicial Review. The Brief in Opposition also makes no effort to dispute our contention (Pet. 24-27) that the court of appeals' decision deprives Ford of any judicial forum in which to obtain a binding resolution of its challenge to the technological and eco-

nomic feasibility of the state SIP. Notwithstanding this Court's decision in *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), teaching that the state courts are the exclusive judicial forum for such challenges, EPA would deprive companies such as Ford of any meaningful opportunity for state court review by telling them that they should be satisfied if, after successfully challenging a state SIP on feasibility grounds, the state court judgment is treated as nothing more than the " 'first step in the [SIP] revision process' " (Br. in Opp. 16 (citation omitted)). And by studiously avoiding the promulgation of its own federal SIP which would be subject to challenge in federal court, EPA has cut off Ford's only other avenue for judicial review.

Thus, EPA simply refuses to come to grips with the basic inequity of its position and the fundamental denial of due process that inevitably results from that position. EPA does not contend that Ford or any other source could ever have complied with Rule 610, nor does it contend that the State would have promulgated the rule if it had been aware at the outset of its infeasibility. Yet EPA insists on enforcing that rule even after the state court has declared it invalid on feasibility grounds. It is simply no answer to say that Ford's due process rights are satisfied by allowing it to plead for the imposition of lesser penalties in the case of a state SIP that has been invalid since its inception.

EPA's only proposed "solution" to Ford's dilemma is to suggest that it should have brought suit to force EPA to conclude its consideration of the proposed SIP revision more promptly. Br. in Opp. 15 n.14. Yet if Ford ever did file such a suit, EPA undoubtedly would say that it is engaged in a "continuing dialogue" with state authorities and is acting "expeditiously in light of the important public rights involved." *Ibid.* Of course, each day of this seemingly interminable "continuing dialogue" could cost Ford up to $25,000 per vinyl coating line, and that dialogue, even if ultimately successful, might not avoid penalties for alleged violations during the years EPA has been

considering the proposed revision. Cf. *United States* v. *National Steel Corp.*, 767 F.2d 1176, 1182 n.1 (6th Cir. 1985).

3. The State Court Judgment Controls. EPA's position also virtually eradicates any meaningful role for the states in the federal-state partnership created by the Clean Air Act. EPA's entire argument depends on its insistence that the issue in this case is whether proposed SIP *revisions* must be approved by EPA before they may become effective. But the SIP revision process is wholly irrelevant to the actual question presented: May a federal administrative agency override the decision of a state court adjudicating the validity or invalidity of the *adoption* of a state SIP? As to *that* issue, which is an inevitable consequence of this Court's decision in *Union Electric*, EPA simply fails to offer any plausible reason to support the denial of certiorari.[1]

Although federal law establishes minimum requirements that states must adopt, state SIPs are nevertheless creatures of state law. They are promulgated by state legislatures or state administrative agencies, and they have the force and effect of state statutes and regulations. Not surprisingly, therefore, nothing in either the language of the Clean Air Act or its legislative history suggests that EPA's approval of a state SIP does anything more than make it federally *enforceable*; EPA's approval does not transform state law into some sort of "born again" federal law, the validity of which must thereafter be decided according to federal law. Indeed, EPA has never contended that its approval of a state SIP transmutes that provision into federal substantive law.

Against this background, EPA does not explain why it is that state court judgments adjudicating the validity

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[1] EPA's reliance (Br. in Opp. 9) on 42 U.S.C. § 7410(i) begs the question. That section, prohibiting modification of SIP requirements except through the revision process, is relevant only in the case of "applicable" plans, and the "applicability" of the Michigan SIP is the very issue in this case.

or invalidity of a state law—the state SIP—may be disregarded by EPA unless and until EPA decides to "ratify" the state court's judgment. EPA does not sit as a reviewing court authorized to affirm or reverse the judgments of state courts. Clearly, any such role for a federal administrative agency would work a radical intrusion on state sovereignty.[2] Absent a clear indication that Congress actually intended to permit a federal administrative agency to so interfere with the workings of state legal systems, it is plain that a state court judgment declaring a provision of state law to be invalid is wholly authoritative.[3]

4. The Federal SIP Route Available To EPA. It is EPA's position, not Ford's, that would work a radical

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[2] There are two entirely separate aspects to the state court judgment. First, the state court ruled that Rule 610 was void from its inception because it was adopted in the belief that it represented RACT when it fact it never did. Validity under state law is an issue as to which only the state courts may speak. The second, and wholly distinct, aspect of the state court's judgment was its ratification of the State's proposal to submit a SIP revision containing new limits to EPA for federal approval. See Pet. 19 n.5. We do not contend that the new limits are binding on EPA until it approves them. The result is that, if EPA relies on a state SIP (rather than promulgating a federal SIP), there is no federally enforceable SIP in place between the time of a state court adjudication of invalidity and EPA's approval of a new SIP. But the length of that period of time is entirely within *EPA*'s control (see Pet. 21; page 5, *infra*). In addition, the source remains subject to any applicable state standard, such as the revised emission limits applicable to Ford's Mount Clemens plant by virtue of the Michigan Air Pollution Control Commission's February 1, 1985 adoption of the the parties' Consent Order. See Pet. App. 26a-32a.

[3] Contrary to EPA's apparent contention (Br. in Opp. 14), our position does not depend upon EPA's being "bound" by the state court judgment in the collateral estoppel sense, nor does it depend upon the state court's being aware of the collateral consequences of its judgment. Instead, it turns on the state SIP's having been declared void from its inception because it never represented RACT. As explained above, there is no justification for permitting EPA to collaterally attack the validity of the state court's ruling as to that issue.

restructuring of the Clean Air Act. Congress explicitly authorized EPA to promulgate a federal SIP as *federal* substantive law, in accordance with procedures mandated by the Administrative Procedure Act, whenever a state fails in its responsibility to promulgate a valid SIP under *state* law. 42 U.S.C. § 7410(c). Thus, when Congress wanted to give EPA the power to create federal law (in contradistinction to federally enforceable state law), it knew exactly how to do it.[4] That EPA has chosen, for whatever reason, not to exercise the express mechanism for the creation of federal law built into the Clean Air Act is no justification for granting it "license to circumnavigate the statutory scheme" (Br. in Opp. 19) by arrogating unto itself the authority to determine the validity or invalidity of state law.[5]

5. The Irrelevance Of "Technology-Forcing." There is also no merit to EPA's contention that acceptance of our position would cause the Clean Air Act's "elaborate technology forcing provisions * * * [to] lose all practical

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[4] A familiar example of Congress's decision to transform state law into federal substantive law is found in the Assimilative Crimes Act, 18 U.S.C. § 13. Prosecutions under that statute are not for the enforcement of state laws, but for the enforcement of federal law assimilating state statutes. See, *e.g.*, *United States* v. *Brown*, 608 F.2d 551, 553 (5th Cir. 1980). Importantly, however, federal courts applying such assimilated state law are bound by state courts' interpretation of their own laws. See, *e.g.*, *United States* v. *Best*, 573 F.2d 1095, 1098-1099 (9th Cir. 1978). See also Note, *The Federal Assimilative Crimes Act*, 70 Harv. L. Rev. 685, 696 (1957) (concluding that "Congress intended to adopt not only the state criminal statutes but also the state courts' interpretation of those statutes").

[5] There is thus no merit to EPA's assertion (Br. in Opp. 14 n.13) that "the Clean Air Act's express provision for a SIP revision process overrides principles of comity." The fact is that it is *Congress* that has decided that federal enforcement depends upon the existence of *either* a valid state SIP *or* a federal substitute promulgated by EPA. Having elected not to follow the federal route, EPA cannot be heard to argue that the state court judgment should be treated as if it had never been entered.

meaning." Br. in Opp. 12.[6] EPA elsewhere acknowledges that RACT is the applicable standard for Ford's Mount Clemens plant. *Id.* at 13 n.12. Thus, EPA's emphasis on "technology-forcing" considerations serves only to obfuscate the critical and undisputed fact that the State never would have promulgated Rule 610 had it known from the outset that the rule was not achievable "by the application of control technology that is reasonably available *considering technological and economic feasibility.*" 45 Fed. Reg. 59331 (1980) (emphasis added) (footnote omitted) (EPA definition of RACT).[7]

6. Nothing Turns On The Issue Of Consent. Despite EPA's suggestions to the contrary,[8] it is impossible to

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[6] Indeed, in the context of this case, it is highly misleading for EPA to assert that the Act's requirements " 'are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible' " (Br. in Opp. 9 (quoting *Union Electric Co.*, 427 U.S. at 257)). EPA's reliance on the "technology-forcing" nature of the Clean Air Act has absolutely no relevance to this litigation.

The technological standard at issue in this case is "RACT"—reasonably available control technology. As we explained in the Petition (at 4, 27), RACT, by definition, is *not* a technology-forcing standard. Technology-forcing standards are found in other sections of the Clean Air Act, such as the new source performance standards. See 42 U.S.C. § 7475(a)(4) ("best available control technology"); 42 U.S.C. § 7503(2) ("lowest achievable emission rate").

[7] Equally beside the point is EPA's observation (see Br. in Opp. 19) that nothing in Michigan law would have prevented the State from choosing to impose a standard more stringent than RACT. It is undisputed on this record that the State intended Rule 610 to represent no more and no less than RACT, and this Court has made it plain that EPA has no authority to question the wisdom of that choice. *Train* v. *NRDC*, 421 U.S. 60, 79 (1975).

[8] By repeatedly stressing that the state court's judgment invalidating Rule 610 was entered on consent, EPA comes perilously close to suggesting that the State of Michigan—including its judicial system—violated its obligations to the public. Although it stops just shy of accusing the State and Ford of collusion, EPA repeatedly suggests that states and their courts are not to be

conclude on this record that the state court's judgment should be given any less controlling effect than would be accorded a judgment that had been fully "litigated." Far from suggesting any improper "deal" between Ford and the State, the record shows that the reason for the State's agreement to the consent judgment was to rectify the fundamental flaw inherent in Rule 610 as originally adopted—a flaw that came about because both Ford and Michigan were misled by a defective EPA technical guidance document.[9]

The State's attorney told his client that he had no viable defense to Ford's state court action because his own witnesses had reached the same conclusion as Ford—*i.e.*, Rule 610 never was achievable through the use of RACT technology. The State's attorney explained that

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trusted, lest they succumb to their "possible inclination * * * to give unduly favorable treatment to local industries." Br. in Opp. 12. See also *id.* at 11, 14, 18-19. There is also a suggestion (*id.* at 14) that state court judges may be willing to sign whatever document is placed before them. EPA's thinly veiled attacks on the integrity of the State are, to say the least, unseemly, and they find not the slightest support in the record of this case.

[9] Rule 610 was based on EPA's Control Technology Guidance (CTG) document for vinyl coatings. The Agency's CTGs were hastily prepared in the period immediately after passage of the 1977 Amendments to the Clean Air Act and without any formal public notice or comment. The vinyl coating CTG assumed that RACT technology would capture 90% of the solvent applied and remove 90% of what was captured, thereby achieving an emission reduction of 81%. Pet. App. 43a.

The CTG's removal efficiency estimate was basically correct, but the capture efficiency estimate was wildly incorrect. Pet. App. 46a-48a. Actual test data show that capture efficiency of an estimated 60% is optimum for the state-of-the-art control equipment installed by Ford. *Id.* at 48a. Even under EPA's standards, there was no other technically and economically feasible alternative for Ford's facility. *Id.* at 49a-50a. Accordingly, the Michigan Air Pollution Control Commission found that, notwithstanding its belief that it was adopting a RACT standard when it first approved Rule 610, the rule was never one that could have been achieved by RACT technology. *Id.* at 27a-28a, 61a-62a.

"all of the people that I would look to as witnesses to defend your rule are people who are here recommending to you that the rule be changed." Pet. App. 60a. EPA's suggestion that there should nevertheless have been a full trial therefore amounts to a contention that the State should have been required to mount a sham defense in the state court action. Clearly, nothing in this case (and nothing in the Sixth Circuit's decision) turns on whether the state court acted "after trial" or "on consent."

CONCLUSION

There is no avoiding the basic federalism and due process issues raised by the petition. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1987

APPENDICES

APPENDIX 1

SUMMARY OF MISLEADING AND UNSUPPORTED ASSERTIONS IN THE GOVERNMENT'S BRIEF

(1) EPA repeatedly asserts (Br. in Opp. 5, 14, 15 n.13) that it was not a party to the state court action. EPA avoids mentioning that its counsel conceded at oral argument before the court of appeals that EPA was not a necessary party to the state court action. See App. 2, *infra*, 4a.

(2) EPA places heavy stress on the "technology-forcing" nature of the Clean Air Act's requirements. See, *e.g.*, Br. in Opp. 9, 12. Those requirements have nothing to do with the RACT-based standard applicable in this case. See pages 5-6 and note 6, *supra*.

(3) EPA charges Ford with dilatory tactics for operating six of the eight vinyl coating lines at the Mount Clemens plant without pollution controls beyond the initial deadline for compliance with Rule 610. Br. in Opp. 15-16 n.14. Ford and the State agreed in 1982 on a plan that permitted Ford to achieve compliance with the equivalent of the emission limitation contained in Rule 610 through use of a "bubble" concept, whereby state-of-the-art technology would be installed on two of the plant's eight coating lines (at a cost of $3 million) and major additional reductions would be obtained on the remaining vinyl coating lines by the introduction of the "embossed last" process that reduced the number of coating applications from three to two (at a cost of an additional $3 million). Pet. App. 44a-45a. By these efforts, Ford reduced *total* VOC emissions from its Mount Clemens plant to a level well below that sought to be achieved by Rule 610 as construed by EPA. See Pet. 8, 21 n.7. EPA continues this action based on violations of the *rate* of emissions allegedly allowed by Rule 610. Contrary to EPA's claim (Br. in Opp. 4-5 n.5), Ford does not concede that it violated Rule 610, because it does not agree that EPA has correctly interpreted the methodol-

ogy for calculating the emission rates contained in the old rule. See Pet. App. 42a.

(4) EPA states (Br. in Opp. 3) that "petitioner urged approval [of Rule 610], providing technical data in support of its recommendation." See also *id.* at n.3. Ford was misled by the erroneous analysis contained in EPA's Control Technology Guidance document for vinyl coatings. See page 7 note 9, *supra.*

(5) EPA observes (Br. in Opp. 4 n.3) that Rule 610 was "not as stringent as limitations recommended by EPA and placed on vinyl coaters in other states." EPA excused the Chrysler Plastic Products Corporation from installing *any* VOC emission control devices and, in approving the Ohio SIP, subjected that company to a less stringent standard of 4.8 pounds of VOC per gallon of coating applied. See 48 Fed. Reg. 31202 (1983). EPA also granted Chrysler an extension of compliance dates to August 1, 1987 and December 31, 1987 under the Ohio SIP. *Ibid.*

(6) EPA disputes (Br. in Opp. 4 n.4) Ford's statement (Pet. 7, 20 n.6) that EPA did not notify the State prior to the filing of its enforcement action against Ford. The State's attorney testified at the hearing before the Michigan Air Pollution Control Commission that the State was not consulted prior to EPA's commencement of suit against Ford (Pet. App. 61a), and EPA does not contend that it issued notice of the action (required by 42 U.S.C. § 7413(b)) prior to suit. The April 19, 1984 Notice of Violation to which EPA refers (required by 42 U.S.C. § 7413(a)(1)) is not the same thing.

(7) EPA contends that the state court judgment was not intended to affect federal enforcement because "nothing in the judgment or the supporting documents indicates that the parties expected to preclude federal enforcement of Rule 610." Br. in Opp. 14. The State's attorney warned the Michigan Air Pollution Control Commission that, by admitting it made a mistake, it could expect "un-

friendly reaction" from EPA because the "United States in effect is trying to enforce your rule in federal court" (Pet. App. 60a-61a). That express warning and statement of the parties' intent *was* included in the supporting documents submitted to the state court.

(8) EPA accuses Ford of misciting *Union Electric* by failing to explain the Agency's statutory authority to ensure that state SIPs meet the Clean Air Act's *minimum* requirements, including the RACT requirement. Br. in Opp. 13 n.13. Ford explained EPA's authority in *exactly* the same terms as does EPA. See Pet. 5 & n.2.

(9) EPA states that "[p]etitioner itself composed the consent judgment's language" (Br. in Opp. 14). Neither the citation proffered by EPA (Pet. App. 22a) nor anything else in the record supports EPA's contention that Ford, rather than Ford and the State jointly, drafted the consent judgment. See Pet. App. 59a-61a.

APPENDIX 2

United States v. Ford Motor Co., No. 85-1945 (6th Cir.)

Transcript of Oral Argument Before the United States Court of Appeals for the Sixth Circuit

December 8, 1986

Before ENGEL, EDWARDS AND JONES, Circuit Judges.

JUDGE ENGEL: Mr. Lazarus.

MR. LAZARUS: Good morning, Your Honor. May it please the Court, I represent the United States on behalf of the Environmental Protection Agency.

* * * * *

JUDGE ENGEL: Could Ford have properly brought this action in the state court had not the instant action already been pending?

MR. LAZARUS: Oh, absolutely—Ford could have brought the ac-- Ford could have brought the action if Ford had believed that the Rule 610 was technologically and economically infeasible. Ford could have brought that action long prior to the federal action.

JUDGE ENGEL: So, so then it has a substantive right to make that kind of challenge—the kind that it did in the—in the state court.

MR. LAZARUS: That's correct.

JUDGE ENGEL: Would EPA have been a necessary party to that proceeding?

MR. LAZARUS: No. EPA would not have been a necessary party to the proceeding.

Supreme Court, U.S.
FILED
AUG 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORD MOTOR COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER FORD MOTOR COMPANY

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BRIEF FOR *AMICUS CURIAE* MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER FORD MOTOR COMPANY

On behalf of its member companies, the Motor Vehicle Manufacturers Association (MVMA) submits this brief *amicus curiae* in support of Ford Motor Company's petition for a writ of *certiorari* in the above case.[1] The decision below is reprinted in the appendix to the Ford petition.

INTEREST OF *AMICUS CURIAE* MVMA

The Motor Vehicle Manufacturers Association of the United States, Inc. (MVMA) is a voluntary non-profit association of companies engaged in the manufacture and sale of

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[1] By letters filed with the Clerk of the Court, both Ford Motor Company and the United States have consented to the filing of this brief.

motor vehicles in the United States.[2] MVMA's members assemble more than 98 percent of the cars, trucks and buses produced in the United States, and operate more than 300 manufacturing facilities. MVMA submits this brief in support of petitioner Ford Motor Company.

This case poses an issue of vital importance to the MVMA's members: may a federal agency enforce State-promulgated environmental regulations that the State's own courts have declared to be invalid *ab initio*? The regulations at issue in this case were promulgated by the State of Michigan pursuant to the Clean Air Act, which was intended to accommodate economic growth with progress in reducing air pollution. *See Chevron U.S.A.* v. *NRDC*, 467 U.S. 837 (1984). The decision below, which upholds an attempt by the federal Environmental Protection Agency to enforce the Michigan standards despite their invalidation by the Michigan court, creates a conflict in the circuits and involves important and recurring issues affecting MVMA members concerning the effect which federal courts should give to a State judicial determination under the Clean Air Act.

STATEMENT

In this case, a Michigan state court entered a final judgment vacating, as of the date of its adoption, a State emission limitation applicable to Ford. The State court found that the limitation was originally adopted in the belief

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[2] The Motor Vehicle Manufacturers Association of the United States, Inc. is an incorporated not-for-profit trade association which has no parent companies, subsidiaries or affiliates. Its members are: American Motors Corporation; Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Manufacturing, Inc.; M.A.N. Truck & Bus Corporation; Navistar International Transportation Corp.; PACCAR Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

that it was achievable through the use of reasonably available control technology (RACT), and that in fact the limitation was not and is not achievable using such technology. There is not a shred of evidence in the record to dispute that determination. With the adoption procedure having been found to be fundamentally flawed, the State court determined that the limitation was void *ab initio*. The Sixth Circuit, however, held that the United States may nonetheless maintain an enforcement action in federal court under the Clean Air Act for alleged noncompliance with this State emission limitation even after it had been vacated by the state that adopted it.

The decision below raises major issues of national importance that are likely to recur. The Sixth Circuit's decision raises fundamental questions as to the enforcement of the Clean Air Act, the relationship between EPA and the states in implementing the Act, as well as practical questions of great importance to the regulated community. Before turning to the facts of this case, we briefly describe the statutory framework and background.

A. The Central Role Of The States In Implementing The Act

The Clean Air Act, as adopted in 1970 and revised in 1977, creates an important federal-state partnership. In the 1970 Act, Congress increased federal authority and responsibility for achieving air quality goals. The states were required to attain federally specified air quality standards within particular periods of time. The statute expressly preserves an important principle, however:

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . . " 42 U.S.C. § 7407(a).

A central mechanism to implement the Clean Air Act involves the formulation by each state of a plan for the implementation, maintenance, and enforcement of the national air quality standards within each region in the state.[3] Implementation plans are adopted by the states and submitted to EPA for review, and within four months EPA must either approve or disapprove all or part of the plan.[4] A plan validly adopted by a state and approved by EPA is enforceable by both the federal government and the state.

It is important to underscore that the Clean Air Act gives EPA no authority to question the wisdom of a state's choices of emission limitations if the plan otherwise satisfies the requirements of the Act. As this Court emphasized in *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 79 (1975), "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."

B. The Consideration Of Technological And Economic Feasibility Under The Act

The Clean Air Act amendments of 1970 established a new beginning in air pollution control. Since the 1970 Act was passed, the nature of the program has been affected by

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[3] A state's implementation plan ("SIP") must include emission limitations, schedules for compliance, and such other measures as may be necessary to ensure attainment and maintenance of the national standards. 42 U.S.C. § 7410(a)(2).

[4] If a state fails to submit a plan within the time prescribed, or submits a plan that the Administrator determines not to comply with the requirements of the Act, the Administrator shall promulgate a plan for that state. 42 U.S.C. § 7410(c). Such an EPA promulgation is subject to notice and comment requirements as well as judicial review, 42 U.S.C. §§ 7607(b) and (d).

federal and state judicial decisions, regulations, and legislative amendments.[5] The need to consider technical and economic feasibility has been an important factor in these developments.

Following the initial submission of state plans, litigation ensued on a variety of issues. One series of cases concerned the availability of variances where prompt compliance was unduly burdensome or impracticable. There was a conflict in the circuits on this issue. In *Train* v. *NRDC*, *supra*, the Supreme Court held that variances could be treated as revisions to a plan under the Act and freely approved by EPA so long as national standards would be attained.

The second major issue to reach the Supreme Court involved the question as to whether EPA should consider technological or economic infeasibility in deciding whether to approve state plans. Once again, there was a conflict among the circuits on the issue, and the Supreme Court granted *certiorari* to provide guidance as to the role of economic and technological factors. In *Union Electric Company* v. *EPA*, 427 U.S. 246 (1976) this Court resolved the conflict by holding that EPA has no power to reject a state implementation plan on the ground that it is technologically or economically infeasible for particular sources to comply. The state, if it so wishes, is free to impose more stringent conditions than the Clean Air Act requires. Thus, the decision held that a party may not in federal court challenge the approval of a state plan on grounds of technological or economic infeasibility. This Court also explained that there

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[5] *See* Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), affirmed by an equally divided court *sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973); Alabama Power Company v. Costle, 636 F.2d 323 (D.C. Cir. 1979); Chevron U.S.A. v. NRDC, *supra*.

are other ways in which such claims of infeasibility may be raised. In particular, the Court noted that a company dissatisfied with a state plan "may be able to take its claims of economic or technological infeasibility to the state courts." 427 U.S. at 266-67.

Following the *Union Electric* decision, the Clean Air Act amendment of 1977 further underscored the importance of technological feasibility in achieving the Act's objectives. The 1977 amendments to the Act provide that SIPs must require existing major plants to achieve such reductions in emissions as may be achieved by application of "reasonably available control technology" or "RACT." 42 U.S.C. § 7502(b)(3).[6] Issues as to technological and economic feasibility thus continue to be of considerable legal as well as practical importance in implementing the Clean Air Act through the SIP process.

C. The Decision Below And Its Impact

This case concerns Ford's plant in Mount Clemens, Michigan, which provided 85 percent of Ford's North American requirements for vinyl-coated materials. In October 1984, Ford filed suit in State court challenging a State plan regulation (Michigan Rule 610) applicable to this plant, contending that the rule was not technologically and economically feasible.[7] The suit prompted further State administrative proceedings, which concluded—after an extensive inquiry by the Michigan Department of Natural Resources and a public hearing before the Michigan Air

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[6] This case involves existing sources subject to RACT. Major new or modified sources (not involved here) must also achieve technology-based emission reductions. *See* 42 U.S.C. § 7475(a)(4) ("best available control technology"), and § 7503(2) ("lowest achievable emission rate"), applicable to attainment and nonattainment areas, respectively.

[7] Appendix to Ford petition at 27a-28a.

Pollution Control Commission—that the regulation was not achievable through the use of reasonably available control technology (RACT). Upon review of the administrative record, the State court issued a final judgment in March 1985, finding that Rule 610 did not represent RACT and vacating the disputed SIP rule as of the date of its adoption.[8]

Pursuant to 42 U.S.C. § 7413, the United States had commenced an enforcement action against Ford to enforce Michigan Rule 610, which action was pending as of the date of the State court decision. Ford moved for judgment on the pleadings in U.S. District Court, on the ground that the State court judgment left Rule 610 unenforceable. The District Court dismissed the complaint, holding that the State court decision was controlling. On appeal, the Sixth Circuit reversed, holding that the State judgment did not bar federal enforcement. The Sixth Circuit treated the State court decision as if it were only an application to EPA to revise the SIP, and held that the revision is ineffective until approved by EPA.[9]

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[8] *Id.* at 23a. The court ordered Ford to comply with modified emission limits adopted by the State agency.

Independent of the State court judgment, the Michigan Air Pollution Control Commission submitted a revised SIP containing new emission limits. This revision has been pending for 2½ years. *See* n.12 below. We agree that these new limits are not federally enforceable until approved by EPA. This case concerns the validity of federal enforcement of the prior limitations that have been vacated by the State court.

[9] The United States argued in its reply brief in the court below that the significance of the State court judgment was diminished because the parties had stipulated for entry of a consent order. However, the State entered into the stipulation after concluding that all of its own potential witnesses supported Ford's position that a mistake had been made in promulgating Rule 610. (*See* Appendix to Ford petition at 59a-60a). As a result, nothing in the Sixth Circuit's decision turned on whether the State court judgment was rendered after trial or on consent.

The decision of the Sixth Circuit leaves EPA free to ignore a state court decision holding invalid a plan provision on the ground that it is not technologically and economically feasible, and to commence an action in federal district court to enforce the plan provision. The decision below vitiates an affected company's right to judicial review of the technical and economic feasibility of a Clean Air Act state implementation plan.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for *certiorari* for three reasons traditionally warranting plenary review. First, the decision below creates a conflict in the circuits and has upset settled expectations concerning the effect of state court review of SIPs. Second, the decision below raises major constitutional issues of federalism and due process that can be authoritatively resolved only by this Court. Third, the decision below raises a problem of nationwide importance under the Clean Air Act that will continue to arise in federal courts unless resolved by this Court.

I. The Decision Below Creates A Conflict In The Circuits And Departs From Prior Decisions Of This Court

The decision below is in direct conflict with the decision of the Seventh Circuit in *Sierra Club* v. *Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983). That decision held that the Clean Air Act "does permit a successful state court challenge to render an implementation plan provision unforceable in both federal and state court." *Id.* at 1148. In the *Sierra Club* case, the state court held invalid certain SIP provisions on the grounds that they were adopted without observance of required procedures. The Seventh Circuit affirmed the dismissal of a suit by the Sierra

Club to enforce these SIP provisions in federal court, holding that the rulings of state courts must be given effect. The court also noted that several federal decisions have encouraged regulated companies to take their SIP challenges to state courts. *Id.* at 1149-51.

The court below attempted to distinguish the *Sierra Club* case on the ground that the Seventh Circuit's decision involved a SIP found invalid on procedural grounds by a state court.[10] This distinction is not meaningful, since the reasoning of the Seventh Circuit is not limited to procedural errors. Instead, the *Sierra Club* decision focuses on the role of the state courts in deciding issues as to the validity of state plans, and the corresponding obligation of federal courts to give effect to such state court rulings. Moreover, there is no basis for distinguishing—as the Sixth Circuit attempted—between procedural and "technical" invalidity in this context. Quite obviously, a regulation can be invalid *ab initio* on both grounds.[11]

The *Sierra Club* decision explicitly intended to "align [the Seventh] Circuit with the holding in *Celotex*." 716 F.2d at 1151. The *Celotex* case involved a SIP provision that had been held invalid in state court on grounds similar to those involved here, namely that the state had failed adequately to consider the "technological feasibility and economic reasonableness of the regulations." *Illinois* v. *Celotex Corp.*, 516 F. Supp. 716 (C.D. Ill. 1981). The District Court dismissed portions of the complaint which sought to enforce the invalidated provision, holding that an unusual and inconsistent scheme would result if the state court ruling

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[10] Appendix to Ford petition at 6a.

[11] *See, e.g.*, Cumberland Medical Center v. Secretary of Health and Human Services, 781 F.2d 536, 538 (6th Cir. 1986).

were not given effect. Thus the decision below conflicts with the Seventh Circuit's decision in the *Sierra Club* case.

The decision below is also contrary to the suggestion by this Court in *Union Electric*, *supra*, that challenges to the technological and economic feasibility of SIPs should be brought in state courts, and may not be raised in a federal challenge to EPA's approval of a SIP. If SIP provisions are federally enforceable despite state court invalidation, state court review becomes meaningless.[12]

II. This Case Presents Major Issues Of Federalism, Comity, And The Implementation Of The Clean Air Act

The Clean Air Act is a federal-state partnership, in which the states have the primary role in establishing emission limitations. This division of responsibility under the Act was highlighted by this Court in *Train* v. *NRDC*, *supra*:

> "The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. . . . The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan

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[12] The Sixth Circuit asserted that meaning could be given to the state court decision as the first step in the SIP revision process. Appendix to Ford petition at 8a. Suffice it to say that the Ford SIP revision has now been pending for more than 2½ years without any final agency action. *See* n.8 above. Meanwhile, EPA contends that it can continue to enforce the old SIP and collect penalties of up to $25,000 per day of violation during the period of EPA's delay. *See* text at n. 22-24 below.

which satisfies the standards of § 110(a)(2) . . ." 421 U.S. at 79.

Consistent with the central role of the states, this Court in *Union Electric* suggested that a party aggrieved by a SIP raise claims of technological or economic infeasibility in state courts. 427 U.S. at 266-67. Ford brought just such a State action, and succeeded in obtaining a judgment holding invalid the applicable State SIP. The result was that the State regulation in question was void as a matter of State law. Consistent with the federal-state scheme under the Clean Air Act, the rule should not be federally enforceable. The Sixth Circuit's decision is totally inconsistent with the primary role of the states under the Act, as well as the opportunity for judicial review in state courts.

It is a basic constitutional principle that federal courts should not interfere with the operation of state courts. *See Younger* v. *Harris*, 401 U.S. 37 (1971). The Sixth Circuit's refusal to give effect to the final judgment of a state court raises similarly serious issues of federalism and comity. The Sixth Circuit was aware that its decision raised "full faith and credit" issues, but brushed these concerns aside, suggesting that the Clean Air Act somehow overrides these principles.[13] However, it is absurd to think that Congress would have intended that a Clean Air Act SIP, "the product of a joint federal and state effort under the same Act, would be enforceable in the courts of one level of government but not the other." *Sierra Club* v. *Indiana-Kentucky*, *supra*, 716 F.2d at 1151.

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[13] Appendix to Ford petition at 7a.

EPA's position violates the requirements of consistency or, if you will, neutral principles of law.[14] The issue is: "Does state law control the content and validity of State adopted SIPs?" The answer must be yes, since EPA cannot determine that a SIP was properly adopted and approvable in the first place except by reference to state law.[15] If state law controls as to the "validity" of a state plan, then an authoritative state determination as to "invalidity" is also controlling. The fact that a state SIP is federally enforceable should not, by itself, change the principle that state law governs the validity of SIPs.[16]

What the Sixth Circuit failed to appreciate in this case is that the statutory framework of the Clean Air Act was meant to create a basic choice of law rule for Clean Air Act enforcement. The general statutory source of authority for such enforcement is the federal Clean Air Act itself, but the specific limitations that provide the basis for detailed regulation are provided by state law. In related contexts, the

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[14] "The demand of neutrality is that a value and its measure be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim." H. Wechsler, *Principles, Politics and Fundamental Law* p. xiii, quoted in A. Bickel, *The Least Dangerous Branch*, p. 50 (2d Ed. 1986).

[15] In order to be approved, a state plan must contain emission limitations that are promulgated and enforceable under State law. 42 U.S.C. § 7410(a)(2)(B), (F); 40 C.F.R. § 51.11. To be approvable, and thus federally enforceable, a SIP must be enforceable by the state.

[16] The government may argue that the EPA approval of a SIP somehow transmutes it into federal law. There is nothing in the statute or legislative history to support that argument. In contrast, when Congress intended to give EPA the power to develop federal SIPs, it did so expressly and clearly defined the grounds and procedures for EPA action. *See* n. 4 above. EPA has not followed these statutory requirements in the present case.

federal courts have insisted that EPA respect state determinations as to the contents of SIPs.[17] Moreover, incorporation of state law into federal statutory enforcement schemes is not unique to the Clean Air Act.[18] Where an incorporation of state law into a federal statutory scheme exists, issues arising solely under such state law are not somehow transmitted into questions of federal common law, but are to be determined by reference to the decisions of the state courts.[19] That was the implicit holding of this Court in *Union Electric Co.* when it declined to permit an aspect of a SIP governed by state law to be challenged in federal court and suggested that the proper channel for review was the state court. It necessarily follows that federal enforcement of a SIP must respect state court interpretations of the validity of state SIP requirements under state law.

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[17] *See* Florida Power and Light Co. v. Costle, 650 F.2d 579, 588 (5th Cir. 1981) (EPA should defer to a state's interpretation of its SIP); Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036 (7th Cir. 1984) (EPA may not, under the guise of partial approval of a SIP, change the substance of a SIP regulation).

[18] *See, e.g.*, Brea-Garcia v. I.N.S., 531 F.2d 693 (3d Cir. 1976) (meaning of term "adultery" in deportation statute governed by state law); United States v. Goings, 527 F.2d 183 (8th Cir.) (federal statute requiring state law to be applied in prosecutions on Indian reservation); Yeager v. Flemming, 282 F.2d 779 (5th Cir. 1960) (legality of marriage giving rise to benefits under the Social Security Act governed by state law); *cf.* United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (priority of enforcement of federal lien governed by state law).

[19] *See* Yeager v. Flemming, *supra* (federal court bound to accept state court judgment that marriage was void *ab initio* under state law for purposes of Social Security Act); *cf.* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Similarly, there is nothing in either the language or legislative history of the Clean Air Act indicating that Congress intended the invalidity of state SIPs to be determined solely by reference to federal law simply because EPA has approved the SIPs.

III. The Decision Below Involves Recurring Questions Concerning Judicial Review And Enforcement Under The Clean Air Act

In a program as complex as the Clean Air Act, legal issues have and frequently will arise concerning the validity of various provisions adopted by the states and approved by EPA. It is important that all parties involved understand the means by which such provisions may be subject to judicial review. The decision below raises a host of problems concerning the implementation of the Clean Air Act. As a result of the conflict in the circuits on this important issue, the thousands of industrial facilities throughout this country that are subject to SIP requirements can have no certainty as to the legal effect of a successful state court challenge to a state plan.

This Court held in *Union Electric* that technological and economic feasibility issues could not be raised in a judicial review proceeding in federal court. The Sixth Circuit's decision here holds that, as far as federal enforcement is concerned, there is no judicial review of such issues in state court either. The result below is that once a state has promulgated a SIP, errors in its original promulgation—such as the erroneous assumption in this case that the SIP limitation imposed on Ford was technologically and economically achievable—are immune from any judicial review. In such a case there is the most literal denial of due process: there is no judicial process in which the validity of such a SIP may be reviewed.

The ultimate result of the conflict created by the decision below is total confusion as to the availability of judicial review of a SIP on technological and economic feasibility grounds. Considering that the importance and pervasiveness of the Clean Air Act's requirements, the burden of this

uncertainty on the courts, EPA, the states, and industry is truly staggering. Moreover, the "solutions" suggested by the Sixth Circuit serve to underscore the major impact of the decision below.

The Sixth Circuit first suggests that "technical infeasibility coupled with good faith efforts" can be considered by a federal district court to mitigate the imposition of monetary penalties in an enforcement action.[20] In other words, after a final determination of the factual issue of technological infeasibility in state court, a company would have to relitigate the issue of technological infeasibility in federal court in the context of mitigation of damages. Following this course would involve a huge waste of federal, judicial, governmental and private resources in relitigating the factual issues.[21] Moreover, the only scope of this "solution" is to permit the district court, on a discretionary basis, to consider the invalidity of the regulation in its decision as to the amount of penalties to be imposed for violation of the regulation. Such a result is analogous to telling a criminal defendant that he may not plead the invalidity of the law he is charged with violating in defense to the charges brought against him, but that once he is convicted he may ask the court to take the law's invalidity into consideration in determining his sentence.

The other "solution," according to the court below, is to seek EPA approval of a revised SIP, which when approved would replace the prior state rules.[22] The difficulty with this

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[20] Appendix to Ford petition at 9a.

[21] The Sixth Circuit has shifted to a federal forum issues that should be resolved in state courts. By contrast, the district court in this case believed that the case could be summarily resolved upon a showing that the state court had held the SIP invalid.

[22] Appendix to Ford petition at 8a.

suggestion is that the federal government takes the position that the prior SIP remains enforceable until EPA acts on the SIP revision. Since the Sixth Circuit has held that EPA may delay indefinitely in taking action on a SIP revision submitted by a state,[23] the uncertain possibility of obtaining a revised SIP at some time in the future is no comfort to a company facing immediate federal governmental and citizen suit for penalties and injunctive relief.[24]

In construing the Clean Air Act, federal and state judicial review and enforcement cannot be regarded as independent and unrelated instruments of justice. The Sixth Circuit's decision fails to appreciate the fundamental need to assure that the objectives of the Clean Air Act will be attained through coordinated federal and state actions. Congress intended that the Act be implemented in a manner consistent with the primary role of the states. Because the decision below does not give due regard to the appropriate function and effect of state court decisions acting within their sphere of exclusive competence, the mandate of Congress has been thwarted, and fundamental due process of law has been denied.

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[23] *See* United States v. National Steel Corp., 767 F.2d 1176, 1182 n.1 (6th Cir. 1985); *but see* American Cyanamid Co. v. EPA, 810 F.2d 493, 500 (5th Cir. 1987).

[24] This is particularly true in light of the fact that EPA has been notoriously slow to act on SIP revisions. *See* n.12 above.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

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